Supreme Court, U.S.
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In The

Supreme Court of the United States

GERALD E. JUELS,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner was a federal employee who was injured in the line of duty. After two years, the agency separated him for medical reasons -- without informing him of his restoration rights. Several years later, and partially recovered, petitioner discovered he had restoration rights and attempted to be restored accordingly. Despite a federal statute mandating how he was to be restored, the agency failed to comply with it, claiming it was not its policy to do so. Was the agency entitled to reject the statute's mandate?

PARTIES

The parties to this proceeding are set forth in the caption.

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INTRODUCTORY STATEMENT

Petitioner is not oblivious to prejudice courts have shown petitioners unrepresented by legal counsel. Petitioner has tried to find competent counsel to represent him but has so far been unsuccessful. Therefore, he asks this Honorable Court's indulgence for his un-lawyerly prepared petition (as he has asked the inferior tribunals) and that the spirit of *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) and its progeny be invoked for his writings which out of necessity must be presented in this manner.

OPINIONS BELOW

The unpublished opinions of the United States Court of Appeals for the Federal Circuit affirming the Merit Systems Protection Board's opinions are reported at *Gerald E. Juels v. United States Postal Service* and are reproduced in the Appendix. Citations are 2009-3171, 2009-3058, DE-0353-08-0023-I-2, SF-0353-08-0093-I-1, respectively.

JURISDICTION

On January 13, 2010, the United States Court of Appeals for the Federal Circuit filed its order of denials of petitioner's petitions for rehearing by the panel, and then, en banc. This petition is filed within

ninety (90) days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

TITLE 5, PART III, Subpart G, CHAPTER 81, SUBCHAPTER I,

§ 8151. Civil service retention rights

(a) In the event the individual resumes employment with the Federal Government, the entire time during which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(b) Under regulations issued by the Office of Personnel Management –

(1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States, the right to resume his former or an equivalent position, as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not

been injured or disabled, including the rights to tenure, promotion, and safeguards in reductions-in-force procedures, and

(2) the department or agency which was the last employer shall, if the injury or disability is overcome within a period of more than one year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing, the employee in his former or equivalent position within such department or agency, or within any other department or agency.

FEDERAL REGULATION INVOLVED

5 C.F.R. Part 353, Subparts A & C provide as follows:

PART 353 – RESTORATION TO DUTY FROM UNIFORMED SERVICE OR COMPENSABLE INJURY

Subpart A – General Provisions

§ 353.101 Scope.

The rights and obligations of employees and agencies in connection with leaves of absence or restoration to duty following uniformed service under 38 U.S.C. 4301 et. seq., and restoration under 5 U.S.C. 8151 for employees who sustain compensable injuries, are subject to the provisions of this part. Subpart A covers those provisions that are common to both of the above groups of

employees. Subpart B deals with provisions that apply just to uniformed service and subpart C covers provisions that pertain just to injured employees.

§ 353.102 Definitions.

In this part:

Agency means.

(1) With respect to restoration following a compensable injury, any department, independent establishment, agency, or corporation in the executive branch, including the U.S. Postal Service and the Postal Rate Commission, and any agency in the legislative or judicial branch; and

(2) With respect to uniformed service, an executive agency as defined in 5 U.S.C. 105 (other than an intelligence agency referred to in 5 U.S.C. 2302(a)(2)(C)(ii), including the U.S. Postal Service and Postal Rate Commission, a nonappropriated fund instrumentality of the United States, or a military department as defined in 5 U.S.C. 102. In the case of a National Guard technician employed under 32 U.S.C. 709, the employing agency is the adjutant general of the State in which the technician is employed.

Fully recovered means compensation payments have been terminated on the basis that the employee is able to perform all the duties of the position he or she left or an equivalent one.

Injury means a compensable injury sustained under the provisions of 5 U.S.C. chapter 81, subchapter 1, and includes, in addition to accidental injury, a disease proximately caused by the employment.

Leave of absence means military leave, annual leave, without pay (LWOP), furlough, continuation of pay, or any combination of these.

Military leave means paid leave provided to Reservists and members of the National Guard under 5 U.S.C. 6323.

Notice means any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an agency by the employee performing the service or by the uniformed service in which the service is to be performed.

Partially recovered means an injured employee, though not ready to resume the full range of his or her regular duties, has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements. Ordinarily, it is expected that a partially recovered employee will fully recover eventually.

Physically disqualified means that:

(1)(i) For medical reasons the employee is unable to perform the duties of the position formerly held or an equivalent one, or

(ii) There is a medical reason to restrict the individual from some or all essential duties because of possible incapacitation (for example, a seizure) or because of risk of health impairment (such as further exposure to a toxic substance for an individual who has already shown the effects of such exposure).

(2) The condition is considered permanent with little likelihood for improvement or recovery.

Reasonable efforts in the case of actions required by an agency for a person returning from uniformed service means actions, including training, that do not place an undue hardship on the agency.

Service in the uniformed services means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and a period for which a person is absent from employment for the purpose of examination to determine fitness to perform such duty.

Status means the particular attributes of a specific position. This includes the rank or responsibility of the position, its duties, working conditions, pay, tenure, and seniority.

Undue hardship means actions taken by an agency requiring significant difficulty or expense, when considered in light of –

(1) The nature and cost of actions needed under this part;

(2) The overall financial resources of the facility involved in taking the action; the number of persons employed at the facility; the effect on expenses and resources, or the impact otherwise of the action on the operation of the facility; and

(3) The overall size of the agency with respect to the number of employees, the number, type, and location of its facilities and type of operations, including composition, structure, and functions of the work force.

Uniformed services means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the Commissioned Corps of the Public Health Service, and any other category of persons designated by the President in time of war or emergency.

§ 353.103 Persons covered.

(a) The provisions of this part pertaining to the uniformed services cover each agency employee who enters into such service regardless of whether the employee is located in the United States or overseas. However, an employee serving under a time-limited appointment completes any unexpired portion of his or her appointment upon return from uniformed service.

(b) The provisions of this part concerning employee injury cover a civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentally [sic] wholly owned by the United States, who was separated or furloughed from an appointment without time limitation, or from a temporary appointment pending establishment of a register (TAPER) as a result of a compensable injury; but do not include –

(1) A commissioned officer of the Regular Corps of the Public Health Service;

(2) A commissioned officer of the Reserve Corps of the Public Health Service on active duty; or

(3) A commissioned officer of the National Oceanic and Atmospheric Administration.

[60 FR 45652, Sept. 1, 1995, as amended at 64 FR 31487, June 11, 1999]

§ 353.104 Notification of rights and obligations.

When an agency separates, grants a leave of absence, restores or fails to restore an employee because of uniformed service or compensable injury, it shall notify the employee of his or her rights, obligations, and benefits relating to Government employment, including any appeal and grievance rights. However, regardless of notification, an employee is still required to exercise due diligence in ascertaining his or her rights, and

to seek reemployment within the time limits provided by chapter 43 of title 38, United States Code, for restoration after uniformed service, or as soon as he or she is able after a compensable injury.

§ 353.105 Maintenance of records.

Each agency shall identify the position vacated by an employee who is injured or leaves to enter uniformed service. It shall also maintain the necessary records to ensure that all such employees are preserved the rights and benefits granted by law and this part.

§ 353.106 Personnel actions during employee's absence.

(a) An employee absent because of service in the uniformed services is to be carried on leave without pay unless the employee elects to use other leave or freely and knowingly provides written notice of intent not to return to a position of employment with the agency, in which case the employee can be separated. (Note: A separation under this provision affects only the employee's seniority while gone; it does not affect his or her restoration rights.)

(b) An employee absent because of compensable injury may be carried on leave without pay or separated unless the employee elects to use sick or annual leave.

(c) Agency promotion plans must provide a mechanism by which employees who are

absent because of compensable injury or uniformed service can be considered for promotion. In addition, agencies have an obligation to consider employees absent on military duty for any incident or advantage of employment that they may have been entitled to had they not been absent. This is determined by:

(1) Considering whether the "incident or advantage" is one generally granted to all employees in that workplace and whether it was denied solely because of absence for military service;

(2) Considering whether the person absent on military duty was treated the same as if the person had remained at work; and

(3) Considering whether it was reasonably certain that the benefit would have accrued to the employee but for the absence for military service.

[60 FR 45652, Sept. 1, 1995, as amended at 64 FR 31487, June 11, 1999]

§ 353.107 Service credit upon reemployment.

Upon reemployment, an employee absent because of uniformed service or compensable injury is generally entitled to be treated as though he or she had never left. This means that a person who is reemployed following uniformed service or full recovery from compensable injury receives credit for the entire period of the absence for purposes of rights

and benefits based upon seniority and length of service, including within-grade increases, career tenure, completion of probation, leave rate accrual, and severance pay.

§ 353.108 Effect of performance and conduct on restoration rights.

The laws covered by this part do not permit an agency to circumvent the protections afforded by other laws to employees who face the involuntary loss of their positions. Thus, an employee may not be denied restoration rights because of poor performance or conduct that occurred prior to the employee's departure for compensable injury or uniformed service. However, separation for cause that is substantially unrelated to the injury or to the performance of uniformed service negates restoration rights. Additionally, if during the period of injury or uniformed service the employee's conduct is such that it would disqualify him or her for employment under OPM or agency regulations, restoration rights may be denied.

§ 353.109 Transfer of function to another agency.

If the function of an employee absent because of uniformed service or compensable injury is transferred to another agency, and if the employee would have been transferred with the function under part 351 of this chapter had he or she not been absent, the employee is entitled to be placed in a position in the gaining agency that is equivalent to

the one he or she left. It shall also assume the obligation to restore the employee in accordance with law and this part.

§ 353.110 OPM placement assistance.

(a) *Employee returning from uniformed service.* (1) OPM will offer placement in the executive branch to the following categories of employees upon notification by the agency and application by the employee: (Such notification should be sent to the Associate Director for Employment, OPM, 1900 E Street, NW., Washington, DC 20415.)

(i) Executive branch employees (other than an employee of an intelligence agency) when *OPM determines* that:

(A) their agencies no longer exist and the functions have not been transferred, or;

(B) it is otherwise impossible or unreasonable for their former agencies to place them;

(ii) Legislative and judicial branch employees when *their employers* determine that it is impossible or unreasonable to reemploy them;

(iii) National Guard technicians when the Adjutant General of a State determines that it is impossible or unreasonable to reemploy a technician otherwise eligible for restoration under 38 U.S.C. 4304 and 4312 (pertaining to character and length of service), and the technician is a noncareer military member who was separated involuntarily from the

Guard for reasons beyond his or her control; and

(iv) Employees of the intelligence agencies (defined in 5 U.S.C. 2302(a)(2)(C)(ii)) when *their agencies* determine that it is impossible or unreasonable to reemploy them.

(2) OPM will determine if a vacant position equivalent (in terms of pay, grade, and status) to the one the individual left exists, for which the individual is qualified, in the commuting area in which he or she was employed immediately before entering the uniformed services. If such a vacancy exists, OPM will order the agency to place the individual. If no such position is available, the individual may elect to be placed in a lesser position in the commuting area, or OPM will attempt to place the individual in an equivalent position in another geographic location determined by OPM. If the individual declines an offer of equivalent employment, he or she has no further restoration rights.

(b) Employee returning from compensable injury. OPM will provide placement assistance to an employee with restoration rights in the executive, legislative, or judicial branches who cannot be placed in his or her former agency and who either has competitive status or is eligible to acquire it under 5 U.S.C. 3304(C). If the employee's agency is abolished and its functions are not transferred, or it is not possible for the employee to be restored in his or her former agency,

the employee is eligible for placement assistance under the Interagency Career Transition Assistance Plan (ICTAP) under part 330, subpart G, of this chapter. This paragraph does not apply to an employee serving under a temporary appointment pending establishment of a register (TAPER).

[60 FR 45652, Sept. 1, 1995, as amended at 64 FR 31487, June 11, 1999; 66 FR 29897, June 4, 2001]

* * *

Subpart C – Compensable Injury

§ 353.301 Restoration rights.

(a) *Fully recovered within 1 year.* An employee who fully recovers from a compensable injury within 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the employee resumes regular full-time employment with the United States), is entitled to be restored immediately and unconditionally to his or her former position or an equivalent one. Although these restoration rights are agencywide, the employee's basic entitlement is to the former position or equivalent in the local commuting area the employee left. If a suitable vacancy does not exist, the employee is entitled to displace an employee occupying a continuing position under temporary appointment or tenure group III. If there is no such position in the local commuting area, the agency must

offer the employee a position (as described above) in another location. This paragraph also applies when an injured employee accepts a lower-grade position in lieu of separation and subsequently fully recovers. A fully recovered employee is expected to return to work immediately upon the cessation of compensation.

(b) *Fully recovered after 1 year.* An employee who separated because of a compensable injury and whose full recovery takes longer than 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States), is entitled to priority consideration, agencywide, for restoration to the position he or she left or an equivalent one provided he or she applies for reappointment within 30 days of the cessation of compensation. Priority consideration is accorded by entering the individual on the agency's reemployment priority list for the competitive service or reemployment list for the excepted service. If the individual cannot be placed in the former commuting area, he or she is entitled to priority consideration for an equivalent position elsewhere in the agency. (See parts 302 and 330 of this chapter for more information on how this may be accomplished for the excepted and competitive services, respectively.) This subpart also applies when an injured employee accepts a lower-graded position in

lieu of separation and subsequently fully recovers.

(c) *Physically disqualified.* An individual who is physically disqualified for the former position or equivalent because of a compensable injury, is entitled to be placed in another position for which qualified that will provide the employee with the same status, and pay, or the nearest approximation thereof, consistent with the circumstances in each case. This right is agencywide and applies for a period of 1 year from the date eligibility for compensation begins. After 1 year, the individual is entitled to the rights accorded individuals who fully or partially recover, as applicable.

(d) *Partially recovered.* Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended. (See 29 U.S.C. 791(b) and 794.) If the individual fully recovers, he or she is entitled to be considered for the position held at the time of injury, or an equivalent one. A partially recovered employee is expected to seek reemployment as soon as he or she is able.

§ 353.302 Retention protections.

An injured employee enjoys no special protection in a reduction in force. Separation by reduction in force or for cause while on compensation means the individual has no restoration rights.

§ 353.303 Restoration rights of TAPER employees.

An employee serving in the competitive service under a temporary appointment pending establishment of a register (TAPER) under § 316.201 of this chapter (other than an employee serving in a position classified above GS–15), is entitled to be restored to the position he or she left or an equivalent one in the same commuting area.

§ 353.304 Appeals to the Merit Systems Protection Board.

(a) Except as provided in paragraphs (b) and (c) of this section, an injured employee or former employee of an agency in the executive branch (including the U.S. Postal Service and the Postal Rate Commission) may appeal to the MSPB an agency's failure to restore, improper restoration, or failure to return an employee following a leave of absence. All appeals must be submitted in accordance with MSPB's regulations.

(b) An individual who fully recovers from a compensable injury more than 1 year after compensation begins may appeal to MSPB as provided for in parts 302 and 330 of this

chapter for excepted and competitive service employees, respectively.

(c) An individual who is partially recovered from a compensable injury may appeal to MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration. Upon reemployment, a partially recovered employee may also appeal the agency's failure to credit time spent on compensation for purposes of rights and benefits based upon length of service.

STATEMENT OF THE CASE

Petitioner is entitled to the provisions of United States statute, Title 5, United States Code, § 8151(a) & (b) and its implementing regulations. To date, and for the reasons illustrated elsewhere in this petition, most of this petitioner's entitlements have been denied.

This case is a classic example of an agency's failure to stand and deliver professionalism. When ethics and common sense could have resolved an issue at its inception, the agency sought to ignore, stall, ridicule, cover-up, harass, and intimidate petitioner and his issue. Though the time and suffering of an agency employee can never be compensated for, there is consolation in discovering through time the crystallized facts that are now available for study and debate. One might call it a learning experience or the maturation of an agency. Whichever predominates,

one thing should be clear: this is a classic to be transcribed and studied well for the many lessons it will impart.

We are now at an important crossroads.

Though petitioner has, through lack of legal training, presented in-artfully a critical issue of the time, the record and the facts will continue to develop until at some point in the future when it can be appreciated more for the lessons and clarity it will reveal.

REASONS FOR GRANTING THE PETITION

A. FACTS

Petitioner sustained an injury on duty while working at the agency's Fargo, North Dakota, Post Office in 1981. The United States Department of Labor's Office of Workers Compensation Program ("OWCP") determined it compensable and provided petitioner benefits through to July 1, 1989, when they were suspended.

Meanwhile, in a letter dated September 27, 1983, the agency notified petitioner that he would be "removed from the Postal Service on November 11, 1983" "for disability" reasons. However, the agency failed to notify him that he would have re-employment rights and benefits under 5 U.S.C. § 8151(a) & (b) and 5 C.F.R., PART 353, Subparts A & C. In fact, the agency "separated for disability" petitioner on February 24,

1984, again without notifying him of his re-employment rights and benefits. Thus, for over 20 years petitioner was unaware he had any re-employment rights and benefits.

It was only in early to mid May of 2005 that petitioner discovered that he may have restoration rights and so he made inquiries with the agency's Fargo, North Dakota and Seattle, Washington, Post Offices. Although the agency was obligated to inform and assist the petitioner in this matter and return him to duty (see DOL's Fact Sheet # 40, page 4, last sentence), the agency's employees did just the opposite. And, the Merit Systems Protection Board's ("MSPB") administrative law judges, Ms. Laura Albornoz and Ms. Kelly Humphrey, appeared to blame petitioner for the 22 month delay in completing his restoration to duty – though this re-employment (effective March 31, 2007) placed him on a new 90 day probationary period and ignored most of his restoration rights. Upon discovering that he was placed on a 90 day probationary period and denied his full restoration rights, he called the American Postal Workers Union's ("APWU") headquarters in Washington, DC, and complained to Mr. Richard Boutwell, Injury Compensation Specialist, who advised petitioner to have the union file two grievances: first, on requiring him to serve a new 90 day probationary period, and second, on failing to restore his full restoration rights and benefits as per statute and regulations. The following day, petitioner contacted the local APWU president, Ms. Tracy Valentine, and made said request.

President Valentine refused to do this stating, "[t]his is way over my head."

Because President Valentine refused to represent petitioner, he contacted United States Senator Byron Dorgan's office. Senator Dorgan wrote a letter to Dakotas District Manager Clem Felchle wherein Mr. Felchle stated that he would have petitioner's case re-evaluated, and he further declared that petitioner would not have to serve a new 90 day probationary period.

Five months later, in a letter dated September 7, 2007, the agency wrote petitioner and announced that it was restoring some of his benefits and denying the others.

Because of this, petitioner again tried to file a grievance through his union, and after being given no assistance, he filed the grievance himself, within the 14 day limit. He also filed an appeal with the MSPB within its 30 day limit. Postal workers are entitled to do this.

In mid October 2007, local union president, Ms. Valentine, designated petitioner to be the union's Step 2 Designee to meet with the Postmaster. At this meeting though, President Valentine abruptly rescinded petitioner's Step 2 Designee status and thus re-appointed herself. She subsequently failed to investigate and write up the "Additions and Corrections" requirement to rebut the agency's denial of petitioner's restoration rights, and sent it up to Step 3 in the fall of 2007 without any response at all. This

failure effectively destroys a grievance and has effectively destroyed petitioner's grievance, though superficially, it remains on hold in Minneapolis, Minnesota's APWU office pending petitioner's MSPB's appeals.

Only a couple months ago, petitioner complained of this lack of union representation to Mr. Richard Boutwell, National APWU Injury Compensation Specialist, and he agreed with petitioner and replied, "[y]ou certainly didn't receive any union representation."

Concerning petitioner's MSPB appeal, it was divided into two separate cases, over petitioner's objections, and is recounted in the record.

B. ARGUMENT

Upon discovering in early to mid May of 2005 that he might have restoration rights, petitioner contacted the agency's Fargo, North Dakota, and Seattle, Washington offices. Contrary to what appears to be the MSPB's Judges' Albornoz and Humphrey's opinions, it was the agency's obligation to notify and guide the petitioner through the proper restoration process, not the petitioner's. The fact that the agency employees never referred or directed petitioner to their own Injury Compensation Office, which was located in the same building (according to Ms. Sue Fletcher), speaks volumes.

The issue here is who had the responsibility to inform petitioner of what to do, and who had access to those experts who knew? The agency had that joint responsibility with OWCP, according to Ms. Jan Lonsdale, Injury Compensation Manager for the agency's Western Area Headquarters in Denver, Colorado, (see Ms. Lonsdale testimony), *not* the petitioner. Further, the petitioner's application of May 23, 2005 clearly put the agency on notice that he still had residuals from his on-the-job injury at the agency's Fargo, North Dakota, Post Office. Yet, the agency never asked for petitioner's medical documents until after his scheduled re-employment at the Grand Forks, North Dakota, Post Office in the late winter or early spring of 2007, because according to Ms. Fletcher, those medical documents were not needed at that time.

The agency's Ms. Fletcher admitted that she saw petitioner's copy of the federal regulations at least by June or July 2005; yet, she never expeditiously pursued this restoration request until downloading and posting an email from the agency's Western Area Headquarters, Injury Compensation Office into a letter she drafted for Ms. Gordon to sign and mail to petitioner. This letter was dated 12/07/05. This admittedly error-filled letter (see Agency File: Tab 4oo) caused petitioner to believe that the agency's position was that he had no restoration rights because he was removed for cause (see 5 C.F.R. § 353.302).

MSPB Administrative Law Judge Humphrey opined that petitioner should have known that the letter's legal citation was erroneous because he had a

copy of the federal regulations. Further, from the date that the 12/07/05 dated letter was mailed until petitioner received it, and until petitioner was notified that his OWCP file had arrived on 01/26/06, and he reviewed it on 01/27/06 to see if he had been removed for cause as the agency's letter implied, a period of about two months, he was held responsible by both Judge Humphrey and Judge Albornoz for causing the delay of his restoration to duty from 05/23/05 to 03/31/07.

The agency's failures were seemingly completely excused.

Apparently, petitioner's nearly two month delay in responding to the agency's admittedly erroneous letter, dated 12/07/05 justified Judge Humphrey and Judge Albornoz's exoneration of all of the agency's violations of the federal statute and its implementing regulations.

The record shows that upon receipt by OWCP of petitioner's file on 01/26/06, petitioner requested an OWCP medical exam on the following day, 01/27/06, and that every letter OWCP subsequently sent petitioner, OWCP also sent the Postal Service's Dakotas District Headquarters beginning with OWCP's 03/17/06 letter to petitioner. Thus, the agency knew, or should have known, that petitioner's restoration claim was valid and it had an obligation "to make every effort" to restore petitioner to duty.

MSPB's Judges Humphrey and Albornoz apparently found this insignificant because they never noted it orally or in writing.

In fact, the many copies of OWCP letters to petitioner which the Postal Service's Dakotas District received, according to Ms. Jan Lonsdale's testimony at the Seattle hearing on 04/17/08 (see transcript pages 133 to 39), were subsequently placed in a file drawer and ignored because the agency's employees did not recognize petitioner's name and did not know what to do with them.

Later, upon examining Ms. Lonsdale's testimony on this agency stupidity, while at the Fargo hearing on 06/18/08 (see transcript pages 50 to 56), petitioner remarked that these agency actions (of placing OWCP's copies of letters to petitioner in a file drawer and ignoring them) were "stupid," and Judge Albornoz abruptly reprimanded him for inappropriate language and gave him a lecture also. Yet, to his astonishment, the most inappropriate actions of the agency were *not* commented upon at all, *nor* were they subsequently commented upon in Judge Humphrey and Judge Albornoz's written opinions. Yet, any perception of failure on petitioner's part was seemingly highlighted, amplified, and opined to be reason enough for the agency's 22 month delay in re-employing him.

Whatever this was, it certainly was not objectivity.

The fact that Judge Humphrey and Judge Albornoz found fault with only petitioner's actions for this 22 month delay is an indictment and evidence enough that they failed to apportion blame objectively. And, it may indicate that the sister agency relationship between these two federal government agencies is just too close to allow for objectivity in judgments.

Further, even after petitioner was re-employed by the agency, and the statute's and regulation's mandates so clear, Judge Albornoz seemingly ignored his submittals identifying 5 U.S.C. § 8151, which the *Gallo v. United States*, 529 F.3d 1334 (Fed. Cir. 2008) decision described as a crucial issue to be determined. Judge Albornoz opined that petitioner was not entitled to the protection of 5 U.S.C. § 8151(a), only § 8151(b)(2), for she failed to address in her opinion petitioner's pleas for § 8151. Petitioner implores all to examine his submittals to prove that he has invoked 5 U.S.C. § 8151, which includes (a) & (b), in his submittals of 12/06/07 and 01/11/08 for starters.

During an Act of God snowstorm that began immobilizing the Denver, Colorado area on December 21, 2006, petitioner faxed-off a copy of his 12/20/06 protest letter that involuntarily accepted a part time position at the agency's Grand Forks Post Office. Because he was given a deadline of 12/22/06 to accept a position, and because of the snowstorm, he determined that he should make every effort to meet that deadline despite the snowstorm. Though his original protest and involuntary acceptance letter dated and sent via Express Mail for Overnight Delivery on

12/20/06 was not received by the agency until 12/26/06 (see Agency File, Tab 4q at page 8, etc.), the agency disingenuously took the unofficial memo page of his faxed copy of his 12/20/06 letter and argued that this implied acceptance of a part time position, and therefore nullified his official letter's contents dated 12/20/06. This memo page (see Agency File, Tab 4q at page 1) politely penciled in an implied acceptance of the Grand Forks position, without space to elaborate, was for the purpose of meeting agency's 12/22/06 deadline and to insure against fax lines being cut or interrupted during transmission by the snowstorm; and so also to preclude the agency's possible argument that he failed to accept its offer by the deadline.

The following Draconian penalty must be noted, too, that according to Office of Personnel Management's ("OPM") Workforce Restructuring Office, Restructuring Information Handbook, Module 6, Reemployment Priority List (September 1998 version) Unit A (Requirement Procedures), Section 7.

> LOSS OF ELIGIBILITY ON THE RE-EMPLOYMENT PRIORITY LIST
>
> 5. EARLY LOSS OF RPL ELIGIBILITY ONLY FOR CERTAIN POSITIONS – EMPLOYEE DECLINES AN OFFER IN FORMER AGENCY (see 7-B-7-5 for additional information).
>
> An agency must remove an employee (or former employee) from consideration on the Reemployment Priority List for all positions with a representative rate at, or below,

> that of any position that the agency offers through the List, and for which the individual has:
>
> (a) Declined an offer of a career appointment; (5 CFR 330.203(c))
>
> (b) Declined an offer of a career-conditional appointment; (5 CFR 330.203(c))

Thus, had petitioner refused agency's offer of a part time position, the agency could have removed him from its RPL. Consequently, petitioner had to accept one of the agency's offerings or lose his right to "priority consideration."

In a telephone conversation with the agency's Western Area Headquarters' attorney, Marcella Terry Clark, petitioner informed her that he only sought justice and that he be provided with that which the statute and its implementing regulations mandated. Then, he asked Ms. Clark if she was interested in justice in this case or just winning. Ms. Clark refused to answer this critical question, and in apparent frustration and exasperation, she sighed deeply and responded, "Oh Gerald, oh Gerald."

This convinced petitioner that Ms. Clark was basically a good and honest person; BUT THAT SHE WAS UNDER INTENSE PRESSURE TO WIN HER CASE AND SAVE THE POSTAL SERVICE MONEY.

And there is substantial evidence of this intense pressure being inflicted on the agency's employees

within the Postal Service's Western Area Operations that is headquartered in Denver, Colorado, and dictates postal operations in most western states (except California and Hawaii) and also controls operations in Washington state and the Dakotas. One only needs to go on-line to the Internet and Google the agency's Western Area Operations' boss's name to find it.

Type in the following: "sylvester black"

Its first items follow:

> League President weighs in on Sylvester Black » **NAPS calls for removal of Sylvester Black, Clem Felchle**

The following letter from NAPS [National Association of Postal Supervisors] President Ted Keating to USPS COO Pat Donahoe has been published on the NAPS web site:

> February 11 2009
>
> Mr. Patrick Donahoe
> Deputy Postmaster General & COO
> United States Postal Service
> 475 L'Enfant Plaza SW
> Washington DC 20260-0050
>
> Pat:
>
> I am requesting the immediate removal of Western Area Vice President Sylvester Black and Dakotas District Manager Clem Felchle for inappropriate and inflammatory remarks on Telecons last week.

Those remarks were:

"Some managers ought to be taken out and executed."

The word "executed" was used more than once.

My question to you today Pat is, what would have happened to a supervisor or postmaster who made similar remarks about craft employees during a service talk? I think we both know the answer to that question.

As we fight for the very survival of the Postal Service, this type of conduct by senior officers cannot be tolerated.

I have on numerous occasions complained to you about the conduct and language used on these Telecons. As Chief Operating Officer of the USPS you have a responsibility to take action.

Sincerely,

Ted Keating
President
Original document at NAPS.org

* * *

League President weighs in on Sylvester Black

Subject: Syl Black/Clem Felchle

Dear Leaguers,

This is likely to be a hot topic tomorrow, so here it is today. This afternoon, I attended a

monthly meeting between Pat Donahoe and the management associations. I appreciate these meetings because we get up to date info on what is happening in the Postal Service and then we get an opportunity to present Pat With burning issues for manager in the field. Because of the nasty situation in so many post offices, I had a larger number of issues than normal. Before I got a chance to present any issues, Ted Keating from Naps dropped a bombshell in the form of a letter from Naps calling for immediate removal of Western Area VP Syl Black and Dakotas District Manager Clem Felchle. Apparently, both managers made remarks in telecons last week as follows:

"Some managers ought to be taken out and executed."

It seems that at least one of these men was recorded making this statement.

I have taken the issue, as have Dale and Ted, of the abusive and threatening tone of so many district managers and MPOOs in some district across the country, to Postal Headquarters.

This time it will be hard to ignore.

Charley Mapa
President
National League of Postmasters

It may be that the MSPB judges, also located in Denver, Colorado, have empathy for their sister agency's predicament, and have opined to exonerate these

threatened employees from their errors and mistakes precipitated by this intense pressure. However, it does not justify the judges' failures to identify the agency's failures to comply with the federal statute.

Further, because the MSPB judges failed to require the agency's compliance with the statute and its implementing regulations, the Court of Appeals for the Federal Circuit judges failed to overturn the MSPB on these points, opining that there was substantial evidence to support the administrative judges' opinions; yet, failing to examine the critical evidence, the administrative judges failed to acknowledge or even mention.

C. CONFLICT WITH FEDERAL STATUTE

The United States Court of Appeals for the Federal Circuit recognized that petitioner objected to having to select from part time positions when the statute clearly states that if agency is unable to provide his former position or an equivalent position, then it must assist him in placement in another agency.

There is great confusion and conflict in the way the statute and regulations are interpreted and applied. This confusion and conflict can only be resolved by this Honorable Court's definitive statement. There are thousands of unfortunate federal employees who are injured in the line of duty and expect fair and humane assistance in their convalescences, rehabilitations, and in their returns to duty. Yet, too many times these dedicated workers receive disparate

treatments from their agencies, the MSPB judges, and their co-workers. These dedicated workers cry out to be relieved from these disparate treatments they receive and which this Honorable Court can address through clarification and standardization. It cannot be presumptuous to say that these thousands of unfortunate victims of workplace tragedies pray that this petition for certiorari will be accepted and approved.

An example of this disparate treatment can be seen in the decisions received by Mr. Gary Nixon (*Gary L. Nixon v. United States Department of the Treasury*, 104 M.S.P.R. 189, Docket Number: DE-0353-05-0214-I-1 (2006)) and the petitioner. In Mr. Nixon's case, the M.S.P.B. judges declared in part the following:

> ¶6 Under 5 C.F.R. § 353.301(b), an employee who separated because of a compensable injury and whose full recovery takes longer than 1 year from the date eligibility for compensation began is entitled to priority consideration, agencywide, for restoration to the position he or she left or an equivalent one provided he or she applies for reappointment within 30 days of the cessation of compensation. "Fully recovered" means "compensation payments have been terminated on the basis that the employee is able to perform all the duties of the position he or she left or an equivalent one." 5 C.F.R. § 353.102.

* * *

¶11 As set forth above, an employee who fully recovers more than 1 year after compensation begins is entitled to priority consideration, agencywide, for restoration to the position he or she left or "an equivalent one" provided he or she applies for reappointment within 30 days of the cessation of compensation. An agency affords priority consideration to the recovered employee by entering his or her name on the agency's reemployment priority list for the competitive service or the excepted service, as applicable. 5 C.F.R. § 353.301(b). For purposes of section 353.301(b), an equivalent position is one of like seniority, status, and pay. *Smith v. U.S. Postal Service*, 81 M.S.P.R. 92, ¶ 6 (1999). Status refers to the particular attributes of a specific position, including the rank or responsibility of the position, its duties, working conditions, pay, tenure, and seniority. 5 C.F.R. § 353.102. For purposes of restoration rights, a position with the same seniority, status, and pay means a position that is equivalent to the former one in terms of pay, grade, type of appointment, tenure, work schedule, and seniority, if applicable; standing within the organization, such as first or second supervisory level, is not a factor. *Burgess v. Department of the Interior*, 95 M.S.P.R. 134, ¶ 7 (2003).

¶12 Here, the appellant was working in the GS-9 Revenue Officer position when OWCP terminated his periodic support payments, and nothing contradicts his assertion that he sought reappointment to the position he

encumbered at the time of his compensable injury before and after he became a GS-9 Revenue Officer. AF, Tabs 2, 8. Because the GS-9 position the appellant now encumbers is a lower graded position than the position he encumbered at the time of his injury, his current position is not "equivalent" to his former position under section 353.301(b).[2] Thus, we find that the appellant fully recovered more than 1 year after he suffered a compensable injury that was the cause of his separation, that, despite his request, the agency has not restored him to a position that is equivalent to the one he encumbered at the time of his injury, and that the agency has violated the appellant's reemployment priority rights by failing to place him on the agency's reemployment priority list from the date that his periodic support payments from OWCP ceased. Under these circumstances, we find that the appellant established Board jurisdiction over his appeal.[3]

[2] As set forth above, the appellant alleged that the agency should have restored him to a GS-12 Revenue Officer position. AF, Tab 2. The record reflects that he held such a GS-12 position at certain times during his employment. AF, Tab 11, Subtab 4t. Nevertheless, OWCP's letters appear to indicate that he held a GS-11 Revenue Officer position at the time of his compensable injury. AF, Tab 11, Subtab 4c, and Tab 16, Subtab 9. Regardless of whether the appellant encumbered a GS-11 or GS-12 Revenue Officer position at the time of

his compensable injury, the GS-9 Revenue Officer position is not "equivalent" to either a GS-11 or GS-12 Revenue Officer position.

[3] Under *Welby v. Department of Agriculture*, 101 M.S.P.R. 17, ¶ 16 (2006), the action that gave rise to the Board's jurisdiction and his Board appeal right was the agency's violation of the appellant's reemployment priority rights by failing to place him on the agency's reemployment priority list. The agency did not inform the appellant of his Board appeal rights when it violated his reemployment priority rights and had earlier misled him into believing that he had no such rights. AF, Tab 8, Subtab ccc. The Board ordinarily will excuse untimeliness in filing a petition for appeal if an agency should have given notice of a right of appeal but did not, as long as the appellant acted promptly and within the allowable time limits once he was aware of the basis of his claim. *Greek v. U.S. Postal Service*, 78 M.S.P.R. 470, 473 (1998). Nothing contradicts the appellant's assertion that he did not learn that he was entitled to reemployment priority until January 31, 2005. AF, Tab 8, Response at 2. The appellant filed his petition for appeal on February 23, 2005. We find that the appellant acted diligently to file his Board appeal when he learned that the agency had violated his reemployment priority rights and that his apparent delay in filing is,

> therefore, excusable. *Id.* The appellant appears to admit that he knew that he had appeal rights when OWCP found that the GS-7 Tax Examiner position was the appropriate position for his return to work in 2000. AF, Tab 16, Appellant Response at 36. However, the content of the appellant's statement shows that he is admitting that he knew that he had a right to appeal OWCP's decision that the GS-7 Tax Examiner position was the appropriate position for his return to work in 2000, not the agency's decision to deny him reemployment priority rights.

¶13 In *Welby v. Department of Agriculture*, 101 M.S.P.R. 17, ¶ 16 (2006), the Board held that, if an appellant establishes Board jurisdiction over his reemployment priority claim under 5 C.F.R. § 330.209, the agency has the burden, on the merits, of proving by preponderant evidence that it did not violate the appellant's reemployment priority rights, including proof that it did not appoint another person who could not have been appointed properly. We therefore remand this appeal for the parties to present evidence and argument on the issue of whether the agency denied the appellant an appointment to a position for which the appellant was qualified and to which another person was not appointed properly if the agency had timely provided the appellant with his reemployment priority rights after the cessation of his OWCP benefits. *Welby*, 101 M.S.P.R. 17, ¶ 20.

> If there was no denial of the appellant's appointment to a position to which he should have been appointed but for a violation of his reemployment priority rights, the agency must extend the appellant's reemployment priority list eligibility for the period of time that the agency did not properly enroll the appellant on the reemployment priority list. *Id.*
>
> ORDER
>
> ¶14 Accordingly, we remand this appeal to the Denver Field Office for further adjudication consistent with this Opinion and Order.

In *Gerald E. Juels v. United States Postal Service*, Docket Number: DE-0353-08-0023-I-2 and Docket Number: SF-0353-08-0093-I-1 (See Appendix, beginning at App. 15), the MSPB judges decided the same (or at least very similar) issues very differently with no apparent explanation why.

Further, the agency contributed to this confusion by claiming on the one hand that its policy is not to restore clerks into full time positions despite the federal statute mandating it. On the other hand, the agency simultaneously claimed that if petitioner failed to accept one of its eleven (11) part time positions offered that it would likely have begun a search in concentric circles beginning at the post office of injury and continue to expand the search for a full time vacant funded position. This begs the question: If the agency's policy is not to restore former

employees injured in the line of duty to their former full time positions or equivalent full time positions, then why initiate the façade of looking for full time positions in concentric circles? This duplicity demanded an explanation, yet the MSPB and Court of Appeals judges failed to address it.

CONCLUSION

This Petition for a Writ of Certiorari should be accepted because of the confusion and disparity of interpretations by the federal agencies, the MSPB, and the Court of Appeals' tribunals which render many times bizarre, disparate, and unjust opinions. Rule 10(a) and (c) of the Supreme Court of the United States will provide for this clarification and standardization, which is long overdue.

It is petitioner's request and expectation that the clear and plain meaning of the United States statute 5 U.S.C. § 8151(a) & (b) and its implementing regulations (note *Jane L. Gallo v. United States*, 529 F.3d 1334 (Fed. Cir. 2008)) be complied with by the Postal Service and that it thereby fairly restores petitioner's seniority (as provided for by APWU-USPS CBA Article 21.4) and pay, *not* just "pay rate" (as MSPB Administrative Judge Albornoz opined) and any additional benefits that justice provides for, and finally, to further assist him in being given "priority consideration" for a full time equivalent position (to the one he held prior) with another federal agency (if this

Honorable Court should exempt the Postal Service on this issue) since the Postal Service is on record as stating that its policy precludes complying with this statutory mandate.

Respectfully submitted,

GERALD E. JUELS
Petitioner, pro se
2402 30th Avenue S., Apt. 1A
Grand Forks, ND 58201
(701) 757-0148

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3171

GERALD E. JUELS,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

Gerald E. Juels, of Grand Forks, North Dakota, pro se.

Amanda L. Tantum, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for respondent. With her on the brief were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Deborah A. Bynum, Assistant Director.

Appealed from: Merit Systems Protection Board

Petition for review of the Merit Systems Protection Board in DE0353080023-I-2.

DECIDED: October 15, 2009

Before NEWMAN, BRYSON, and DYK, Circuit Judges.

PER CURIAM.

Gerald E. Juels ("Juels") appeals the final order of the Merit Systems Protection Board ("Board") finding that the United States Postal Service ("agency") did not violate his restoration rights as a fully recovered employee. *See Juels v. U.S. Postal Serv.*, No. DE-0353-08-0023-I-2 (M.S.P.B. Mar. 11, 2009). We *affirm*.[1]

BACKGROUND

On October 9, 1981, Juels sustained a work-related injury to his back while working as a mail clerk at the agency's Fargo, North Dakota post office. The Department of Labor's Office of Workers' Compensation Programs ("OWCP") found that his injuries were compensable, and Juels received workers' compensation benefits from November 24, 1981, through July 1, 1989. As a result of his failure to appear for a medical examination on June 1, 1989, his benefits were suspended a month later. Meanwhile, effective February 24, 1984, Juels was removed from the agency due to his extended absence without pay because of illness.

On January 27, 2006, more than sixteen years after his benefits were terminated, Juels sent a letter to the OWCP indicating he wished to be scheduled for

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[1] This court previously affirmed the Board's separate ruling that the agency did not violate Juels's restoration rights as a partially recovered employee. *Juels v. U.S. Postal Serv.*, No. 2009-3058, 2009 WL 1519896 (Fed. Cir. June 2, 2009).

a medical examination. Based on Juels's willingness to appear for an examination, the OWCP restored his benefits effective on the date of Juels's letter. Following the medical examination, Juels was deemed "fully recovered," and the OWCP notified him on August 11, 2006, that his benefits were being terminated and informed him of his restoration rights as a fully recovered employee.

Civil service employees injured on the job and who fully recover after more than one year are accorded priority consideration for reemployment in the employee's former position or an equivalent one. 5 U.S.C. § 8151(b)(2) ("[T]he department or agency which was the last employer shall, if the injury or disability is overcome within a period of more than one year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing, the employee in his former or equivalent position within such department or agency, or within any other department or agency."); 5 C.F.R. § 353.301(b). The request must be made within thirty days of the cessation of compensation. 5 C.F.R. § 353.301(b). On September 8, 2006, Juels submitted a request for reinstatement, and on December 11, 2006, the agency offered him his choice of eleven positions throughout the Dakotas District. All of these were part-time flexible ("PTF") positions, rather than full-time. Juels objected to receiving only offers for PTF positions, but nevertheless accepted a mail clerk position in Grand Forks, North Dakota, where on March 31, 2007, he was restored to duty.

Juels appealed to the Board alleging that the agency had violated his restoration rights. The Administrative Judge ("AJ") found that a PTF position was not the equivalent of a full-time position and that offering Juels a PTF position did not satisfy the agency's obligations. *Juels v. U.S. Postal Serv.*, No. DE-0353-08-0023-I-2, slip op. at 9 (M.S.P.B. Sept. 29, 2008) ("*Initial Decision*"). At the same time, she noted that under the regulations, Juels had no absolute right to his former position or an equivalent one. *Id.* His challenge therefore required a showing that he was denied his former position or an equivalent one due to the employment of another person. *See* 5 C.F.R. § 302.501. The AJ found that the agency had not improperly hired another in lieu of Juels because it did not hire any external candidates into full-time clerk positions, instead promoting from within. *Initial Decision* at 10. The AJ also rejected Juels's assertion that the agency had a continuing obligation to place him in an equivalent full-time position following his acceptance of the PTF position. *Id.* at 12. Finally, the AJ found that the agency properly restored Juels's rights, benefits, and status after his return to duty. *Id.* at 12-13.

On March 11, 2009, the Board denied Juels's petition for review, and the AJ's decision became the final decision of the Board. Juels then timely petitioned for review of the Board's decision in our court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9) and 5 U.S.C. § 7703(b)(1).

DISCUSSION

The scope of our review in an appeal from a Board decision is limited. We can only set aside the Board's decision if it was "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c).

The burden of showing jurisdiction is on the petitioner. *See* 5 C.F.R. § 1201.56(a)(2)(i). Whether the Board has jurisdiction over an appeal is a question of law, which we review de novo. *Delalat v. Dep't of Air Force,* 557 F.3d 1342, 1343 (Fed. Cir. 2009). The government contends that the Board has jurisdiction only if Juels made non-frivolous allegations that another was employed in derogation of his reemployment priority rights, and that Juels's allegations were insufficient to satisfy that standard; therefore the Board lacked jurisdiction. The AJ disagreed and granted the hearing. We see no error in the AJ's decision that the Board had jurisdiction over Juels's appeal.

Juels argues that his reemployment rights were violated because he was placed in a PTF position, which is not equivalent to his former full-time position. However, a former employee who fully recovers more than one year after the date of an injury is entitled only to priority consideration and has no absolute right to an equivalent position. *Kachanis v.*

Dep't of Treasury, 212 F.3d 1289, 1295 (Fed. Cir. 2000).

Juels's claim thus depends upon a showing that he was denied his rights because of the employment of another person. *See* 5 C.F.R. § 302.501. The facts presented at the hearing established that no external candidates were hired into full-time clerk positions in place of Juels. Rather, these positions had been filled with internal candidates in accordance with agency policy. Neither the statute according Juels priority consideration, 5 U.S.C. § 8151(b)(2), nor the applicable implementing regulations for the excepted service (including the agency), 5 C.F.R. pts. 302, 353, address the scope of "priority consideration." The Board has previously held that promoting an internal candidate into a position is not the "employment of another person" contemplated by 5 C.F.R § 302.501. *See Pugh v. U.S. Postal Serv.,* 81 M.S.P.R. 313, 321 (1999). The reemployment regulations regarding the competitive service explicitly allow positions to be filled with internal candidates before looking to the reemployment priority list. 5 C.F.R. §§ 330.201(a), 330.205(c) (stating that the priority rules favoring applicants on the reemployment priority list do not apply to "actions involving employees on an agency's rolls" or when "filling a specific position . . . [b]y a current, qualified employee of the agency through . . . [d]etail or position change (promotion, demotion, reassignment)"). The agency's actions evince a reasonable construction of the priority consideration language of the statute, to which we owe deference.

See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984). There appears to be no reason why a different interpretation of the statute should be followed for the excepted service, and we hold that the agency's approach is not in violation of the statute.

Juels argues that once he voluntarily accepted the Grand Forks position, the agency was still obligated to continue searching for equivalent positions. He has not established, however, that any full-time positions were available as to which he had a right to claim priority. Candidates have a right to remain on the priority reemployment list for a period of only two years (although the agency has discretion to extend the period). 5 C.F.R. § 302.303(b). Juels was entitled to priority for the two-year period beginning September 8, 2006, when he applied for reinstatement and ending September 7, 2008. Assuming that Juels is correct that he should have remained on the priority reemployment list following his acceptance of the PTF position on December 20, 2006, he must still demonstrate that his restoration rights were violated by the agency's employment of an external candidate during the two-year period. *See* 5 C.F.R. § 302.501 and discussion *supra*. The AJ found that only internal candidates were placed in full-time clerk positions, and Juels on this appeal does not claim that any external candidates were employed in full-time clerk positions during the two-year period. Therefore, the issue of whether the agency should have retained Juels on the priority reemployment list for full-time

clerk positions following his acceptance of the PTF position is moot.

Juels also alleges that his rights and benefits were improperly restored following his return to duty. Upon reemployment after recovering from a work-related injury, a federal employee is entitled to credit for the entire time he received compensation for the purposes of calculating rights and benefits. 5 U.S.C. § 8151(a); 5 C.F.R. § 353.107. The AJ found that all of Juels's rights and benefits had been properly restored. We see nothing that warrants setting aside that finding. The record demonstrates that the agency properly calculated Juels's rights and benefits relating to his pay rate, leave accrual, years of service, completion of probationary period, sick leave, and retirement plan status. In addition, his seniority date was appropriately set per the American Postal Workers Union's collective bargaining agreement with the agency.

For the aforementioned reasons, we affirm the Board's decision.

COSTS

No costs.

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3058

GERALD E. JUELS,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

Gerald E. Juels, of Grand Forks, North Dakota, pro se.

Amanda L. Tantum, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for respondent. With her on the brief were Michael F. Hertz, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Kenneth M. Dintzer, Assistant Director.

Appealed from: Merit Systems Protection Board

Petition for review of the Merit Systems Protection Board in SF-0353-08-0093-I-1.

DECIDED: June 2, 2009

Before NEWMAN, MAYER, and SCHALL, Circuit Judges.

PER CURIAM.

Gerald E. Juels appeals the final order of the Merit Systems Protection Board denying his petition for review of the initial decision finding that the United States Postal Service ("agency") did not violate his restoration rights as a partially recovered employee. *See Juels v. United States Postal Serv.*, No. SF-0353-08-0093-I-1 (M.S.P.B. May 23, 2008). The board concluded that there was no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation affecting the outcome. 5 C.F.R. § 1201.115(d). We *affirm*.

Juels' tenure as a postal service employee began in 1974 with his employment as a part-time flexible ("PTF") Distribution Clerk in Des Moines, Iowa. Except for an 8-month period from 1975-1976, his service continued uninterrupted until October, 1981, when he sustained a work-related back injury while working as a Distribution Clerk at the Fargo, North Dakota, Post Office. He received Workers' Compensation benefits for lumbar strain and psychogenic conditions from November 24, 1981, through July 1, 1989. The agency removed him from service because of his disability effective February 24, 1984.

On May 23, 2005, Juels visited the agency's Seattle District Personnel Services Office and indicated that he was interested in returning to work for the agency. He was given a reinstatement application, which he completed and submitted, seeking

employment as a Distribution Clerk in Seattle. Before rehiring a former employee, the agency requires a review of the former employee's Official Personnel Folder ("OPF"). Because twenty years had passed since Juels' employment with the agency, his OPF had been archived at the National Personnel Records Center ("NPRC") in St. Louis, Missouri. Both Human Resources specialists with whom Juels interviewed sent requests to NPRC for Juels' OPF.

Typically, the Department of Labor's Office of Workers' Compensation Programs ("OWCP") reviews the employee's latest medical records, determines whether the employee is partially or fully recovered, and provides the agency direction with respect to an appropriate restoration position. Juels' request presented an atypical situation, however, because he contacted the agency directly to initiate the restoration process and did not provide medical documentation of his injury or recovery. Because the agency has a seven-year retention policy for injury compensation files and he had not been employed by the agency for over twenty years, the agency sent him a letter requesting more information to support his request for reemployment. He did not respond to the letter, but instead requested his file from OWCP, which he received January 26, 2006. On June 2, 2006, he underwent a medical examination in which he was deemed "fully recovered" from his 1981 work-related injury. On August 11, 2006, the OWCP terminated his claim for medical and wage loss benefits, and informed him of his restoration rights as a fully

recovered employee. He then submitted a request for reinstatement with the Seattle District Personnel Office along with OWCP's letter terminating his benefits.

The agency maintained that it was required to initially review available positions in Juels' pre-injury commuting area. Though Juels repeatedly expressed his desire for a full time position in Seattle, he also wrote a letter to the postmaster in Fargo, North Dakota, indicating that the Fargo Post Office remained his first choice for restoration. Because no full-time positions were available in the Dakotas District, where Juels lived and worked when he first began receiving OWCP benefits, he was offered several PTF positions, and was ultimately reinstated effective March 31, 2007, as a PTF mail processing clerk in Grand Forks, North Dakota. On April 12, 2007, after his restoration, Juels provided the agency with medical reports dated May 27, 2005, which found him partially recovered from his work-related injuries and capable of performing light work.

On appeal, Juels asserts that the agency acted arbitrarily and capriciously in denying his request for restoration as a partially recovered employee. He argues that the agency failed to comply with the regulatory requirement that "[a]gencies must make every effort to restore in the local commuting, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty." 5 C.F.R. § 353.301(d). Specifically, Juels takes

issue with the agency's actions in considering him for reinstatement rather than for restoration in the Seattle District. He also contends that in reaching its fact-sensitive decision, the board failed to properly analyze and weigh conflicting testimonies of the agency's witnesses.

The scope of our review in an appeal from a decision of the board is limited. Generally, we must affirm the decision unless we find it to be "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). The board found that although the agency effectively denied Juels' claim for restoration as a partially recovered employee through its delay – because by the time he was placed in his PTF position in Grand Forks he was a fully recovered employee – that delay was reasonable under the circumstances. Specifically, the board found that the agency's delay in restoration was reasonable in light of (1) Juels' twenty year lapse in employment with the agency and consequent lack of an OPF, (2) the agency's lack of medical documentation of his injury and recovery, (3) Juels' failure to respond to the agency's request for additional information, but to instead await retrieval of the OWCP archived file, and (4) Juels' contradictory communications about reemployment in Seattle and in Fargo. Given these circumstances, and the fact that the agency ultimately restored him to service, the board concluded that the agency did not arbitrarily or capriciously

refuse to restore Juels as a partially recovered employee.

We agree with the board. Because Juels had been removed by the agency over twenty years ago, retrieving employment, medical, and OWCP records required more time and legwork than a typical restoration case requires. Without timely receipt of medical documentation showing that Juels was partially recovered, the agency could not identify positions within his medical restrictions. And by declining to respond to the agency's request for information substantiating his right to restoration, Juels contributed to the delay. We also reject Juels' contention that the board failed to properly consider testimony of the agency's witnesses in reaching its decision. Indeed, in its decision the board specifically noted the testimony of particular agency witnesses with respect to documentation and other atypical issues that delayed the process of placing Juels in an appropriate position within the agency. The board's fact finding function is benefited by the opportunity to hear live testimony and assess witness demeanor and credibility firsthand. Substantial evidence supports the board's determination that agency personnel did not act in bad faith or contrary to law in the course of dealing with Juels' restoration to employment. Because the board applied the appropriate legal standards, and substantial evidence supports its conclusions, its decision must stand.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

GERALD E. JUELS,
Appellant,

DOCKET NUMBER
DE-0353-08-0023-I-2

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: September 29, 2008

Gerald E. Juels, Grand Forks, North Dakota, pro se.

Marcella T. Clark, Esquire, Denver, Colorado, for the agency.

BEFORE
Laura M. Albornoz
Administrative Judge

INITIAL DECISION

INTRODUCTION

On October 11, 2007, the appellant, a part-time flexible (PTF) Mail Processing Clerk, Grand Forks, North Dakota, filed a timely appeal[1] alleging the agency violated his restoration rights under 5 C.F.R. § 353.301(b), as an employee who fully recovered

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[1] The appeal was dismissed without prejudice on May 9, 2008. Initial Appeal File (IAF1), Tab 38. The appeal was refiled *sua sponte* on June 8, 2008. Initial Appeal File 2 (IAF2), Tab 1.

after one year.[2] IAF1, Tab 1. The Board has jurisdiction over the appeal pursuant to 5 C.F.R. § 353.304(b). A Board hearing was held in the appeal on February 12 and June 18, 2008.

For the following reasons, I find the agency did not violate the appellant's restoration rights pursuant to 5 C.F.R. § 353.301(b), and his request for restoration is DENIED.

ANALYSIS AND FINDINGS

Background

The following facts are undisputed unless otherwise noted. The appellant, who is 57 years old, was employed by the agency starting on January 28, 1974, as a PTF Distribution Clerk in Des Moines, Iowa. Effective September 5, 1975, he resigned from the U.S. Postal Service. IAF1, Tab 13, Subtab 4uu, pp. 7-9. Effective May 18, 1976, the appellant was reinstated with the agency as a Distribution Clerk in Lubbock, Texas, and later was reassigned to a part-time letter carrier position effective November 20, 1976. *Id.*, pp. 4-6. Effective September 10, 1977, the appellant transferred to Provo, Utah, as a Distribution

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[2] On September 19, 2008, the Board denied the appellant's petition for review (PFR) of a May 23, 2008 initial decision finding the agency did not act arbitrarily and capriciously in denying his request for restoration as a partially recovered employee pursuant to 5 C.F.R. § 353.301(d). *See Juels v. U.S. Postal Service*, SF-0353-08-0093-I-1 (Final Order, September 19, 2008).

Clerk. On August 11, 1979, he transferred to the Fargo, North Dakota Post Office as a Distribution Clerk. *Id.*, pp. 1-3.

On October 9, 1981, while working at the Fargo Post Office, the appellant sustained a work-related injury to his back. At the time he sustained the injury, he stopped working and sought medical treatment. His injury was accepted by the Department of Labor, Office of Workers Compensation Programs (OWCP), for lumbar strain and psychogenic pain conditions. OWCP provided compensation benefits to the appellant from November 24, 1981, through July 1, 1989. IAF1, Tab 13, Subtab 4rr, pp. 3-19.

On September 27, 1983, the agency issued a notice of proposed removal to the appellant, that he received on October 6, 1983, indicating he would be separated "for disability." The notice stated that he had been absent without pay because of illness since November 24, 1981. The agency removed the appellant effective February 24, 1984. IAF1, Tab 13, Subtab 4tt.

OWCP scheduled the appellant for a second opinion medical examination on June 1, 1989. When the appellant failed to appear for the medical examination, OWCP suspended his benefits for non-cooperation, effective July 7, 1989. The appellant did not appeal OWCP's decision. IAF1, Tab 13, Subtab 4nn, p. 1.

More than 20 years after his removal, in May 2005, the appellant visited the agency's Seattle

District Personnel Services Office and inquired about reemployment. On May 23, 2005, the appellant submitted his completed application for employment with the agency's Seattle District Office. IAF1, Tab 13, Subtab 4qq. The agency's actions from May 2005 through August 2006 are the subject of the appellant's previous Board appeal concerning his restoration rights in the Seattle District Office as a partially recovered employee. *See* footnote 2, *supra*.

On January 27, 2006, the appellant sent a letter to OWCP indicating he wished to be scheduled for a medical examination. IAF1, Tab 13, Subtab 4nn. Based on the appellant's actions, OWCP eventually restored the appellant's, benefits effective January 27, 2006, the date he had indicated his willingness to undergo a medical examination. IAF1, Tab 13, Subtab 4x, p. 1; and Subtab 4rr, p. 2.

On June 2, 2006, the appellant underwent a second opinion medical examination directed by OWCP. In medical reports dated June 2, 2006, the physicians who examined the appellant opined that he no longer had a medical condition or disability as a result of his 1981 work-related injury. Accordingly, OWCP issued a notice proposing that the appellant's medical benefits and compensation for wage loss be terminated. IAF1, Tab 13, Subtab 4mm. On August 11, 2006, OWCP notified the appellant that his claim for medical and wage loss benefits was terminated effective August 11, 2006, because the medical evidence showed he no longer had any residuals or disability due to his work injury. IAF1, Tab 13, Subtab 4ll. OWCP notified the

appellant that employees who recover after one year are entitled to priority consideration provided they apply for reemployment within 30 days after compensation ends. *Id.* On August 11, 2006, the appellant was fully recovered from his compensable injury.

On September 8, 2006, the appellant submitted a request for reinstatement to the Seattle District Office, along with OWCP's letter terminating his benefits. IAF1, Tab 13, Subtab 4ii. On September 12, 2006, Kathleen Grosso, Seattle District Manager of Human Resources (HR), sent the appellant a letter advising him to contact HR Specialist Jay Bonner to begin the pre-employment process. IAF1, Tab 13, Subtab 4hh. On October 6, 2006, the appellant sent a letter to Katherine Nash, the Seattle Postmaster, informing her that he was a former Postal worker attempting to return to duty after a compensable injury. Nash forwarded his letter to Grosso. IAF1, Tab 13, Subtabs 4ff and 4cc. On October 6, 2006, the appellant met with Evelyn Gordon, Manager of Personnel Services for the Seattle District, regarding his prospective reemployment, and he agreed to take Test 473 (a Postal examination all new employees must pass) on October 11, 2006. IAF1, Tab 13, Subtab 4ee.

On October 30, 2006, the appellant sent a letter to Gregory Johnson, Postmaster of the Fargo Post Office, informing him that he was attempting to return to duty after a compensable injury. He stated that the injury occurred at the Fargo Post Office on October 9, 1981, and that he had been separated for disability on February 24, 1984. The appellant stated

in his letter that the Fargo Post Office "has been and remains [his] first choice for restoration with the U.S. Postal Service" and requested to be notified of any openings for Distribution Clerk positions. IAF1, Tab 13, Subtab 4dd.

The appellant sent a second letter to Nash on November 2, 2006, stating that he preferred to be reinstated to the Fargo Post Office, but he would accept Seattle or another location, if necessary. IAF1, Tab 13, Subtab 4bb. Nash responded on November 7, 2006, and forwarded a copy of his letter to Grosso. IAF1, Tab 13, Subtab 4y. On November 3, 2006, Grosso sent a letter to the appellant informing him that his request for restoration would be forwarded to the Dakotas District for action because that was his former commuting area. IAF1, Tab 13, Subtab 4aa.

On November 7, 2006, the appellant wrote to Grosso, complaining that he had made Seattle his home and he did not think it was reasonable for the agency to expect him to move to another location. IAF1, Tab 13, Subtab 4x. He stated that since OWCP declared him fully recovered, he was seeking restoration as a fully recovered employee and for the agency to restore him in Seattle, his current place of residence. *Id.*

The appellant's November 7, 2006 letter was forwarded to Jan Lonsdale, Manager of Injury Compensation for the agency's Western Area. On November 20 and 30, 2006, Lonsdale informed the appellant that she was investigating his concerns and would

respond to his letter. IAF1, Tab 13, Subtabs 4u and 4v. Lonsdale explained in her letters to the appellant that obtaining all of the required information was a challenge because of "the unique circumstance of [his] separation from the Postal Service more than 20 years ago and lack of any communication until last year." *Id.* She notified him that the agency was looking for an appropriate placement for him as a fully recovered employee pursuant to 5 C.F.R. § 353.301(b).

On December 6, 2006, Lonsdale sent the appellant a letter explaining that OWCP ended his compensation on August 11, 2006, and therefore his rights as a fully recovered employee began on that date. IAF1, Tab 13, Subtab 4t. She stated that the agency would search for work agency-wide, starting with his former commuting area of Fargo, until an appropriate position was found. *Id.*

Lonsdale contacted the agency's HR department in the Dakotas District and requested that they compile a list of all vacant positions in the district. *See* June 18, 2008 Hearing Compact Disc (HCD2), Testimony of Lonsdale. There were 11 vacant, available PTF positions in the district, but there were no vacant, funded full-time regular positions at that time. *Id.*

On December 11, 2006, Lonsdale sent a letter to the appellant identifying the 11 vacancies throughout the Dakotas District. IAF1, Tab 13, Subtab 4r. One of the vacancies was a PTF Sales and Service Distribution Associate in West Fargo, North Dakota, within

the appellant's former commuting area. Ten additional vacancies were PTF positions located in North and South Dakota, including in Grand Forks, North Dakota. The letter stated that the offer of those positions was open until December 22, 2006, and that if the appellant accepted one of the positions the agency would complete the hiring process and provide a start date. *Id.*

On December 22, 2006, the appellant accepted the position of PTF Mail Processing Clerk[3] in Grand Forks, North Dakota. IAF1, Tab 13, Subtab 4q; HCD2, Testimony of Gerald Juels. On March 31, 2007, the appellant was restored to duty as a PTF Mail Processing Clerk, PS-5, at the Grand Forks Post Office, where he currently works. IAF1, Tab 13, Subtabs 4n, 4m, and 4l.

Applicable Law

Although restoration rights following a compensable injury are statutory, 5 U.S.C. § 8151(b)(2), the statute does not confer a right of appeal to the Board. Rather, Board appeal rights derive from the Office of Personnel Management's (OPM's) regulations. The

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[3] At some point since the appellant's former employment at the agency, the agency stopped using the job title Distribution Clerk, and now calls that position Mail Processing Clerk. February 12, 2008 Hearing Compact Disc (HCD1), Testimony of Kathy Flaa.

restoration regulations provide, in relevant part, as follows:

> Fully recovered after 1 year. An employee who separated because of a compensable injury and whose full recovery takes longer than 1 year from the date eligibility for compensation began . . . is entitled to priority consideration, agencywide, for restoration to the position he or she left or an equivalent one provided he or she applies for re-appointment within 30 days of the cessation of compensation. Priority consideration is accorded by entering the individual on the agency's reemployment priority list for the competitive service, or reemployment list for the excepted service.

5 C.F.R. § 353.301(b).

"Fully recovered" means "compensation payments have been terminated on the basis that the employee is able to perform all the duties of the position he or she left or an equivalent one." 5 C.F.R. § 353.102; *Nixon v. Department of the Treasury*, 104 M.S.P.R. 189, ¶ 6 (2006). OWCP's determination that an individual is fully recovered is "final and conclusive for all purposes and with respect to all questions of law and fact." 5 U.S.C. § 8128(b)(1). Accordingly, it is binding on the Board. *As'Salaam v. U.S. Postal Service*, 85 M.S.P.R. 76, ¶ 15 (2000).

An injured or former employee in the executive branch, including the U.S. Postal Service, who believes that his reemployment priority rights have

been violated, may appeal to the Board under the provisions of the Board's regulations. 5 C.F.R. § 353.304(a). *As'Salaaam* [sic], 85 M.S.P.R. 76, ¶ 16; *Nevins v. U.S. Postal Service*, 107 M.S.P.R. 595, ¶ 10 (2008). The jurisdictional test in such cases is whether the appellant makes nonfrivolous allegations that: (1) he was separated because of a compensable injury; (2) he has fully recovered more than one year after the date he became eligible for OWCP benefits; (3) he requested restoration within 30 days after the cessation of OWCP compensation; and (4) he believes that the agency violated his reemployment priority rights. *Id.*, ¶ 11 (citing *Welby v. Department of Agriculture*, 101 M.S.P.R. 17, ¶ 15 (2006)); *DeBlock v. U.S. Postal Service*, 107 M.S.P.R. 90, ¶ 8 (2007).

If the appellant makes the required nonfrivolous allegations that the agency denied him reemployment priority rights, he is entitled to a hearing on the merits. If the appellant establishes the Board's jurisdiction over his reemployment priority claim, then the agency has the burden of proving by preponderant evidence that it did not violate the appellant's reemployment priority rights, including proof that it did not appoint another person who could not have been appointed properly. *Nevins*, 107 M.S.P.R. 595, ¶ 11.

For a person who recovers from a compensable injury after more than one year, there is no absolute right to restoration. Rather, as explained above, the person is entitled to priority consideration for reemployment. 5 C.F.R. § 353.301(b) (2006). Because

the Postal Service is not in the competitive service, but is excepted service employment, an appellant has an appeal right to the Board only when he presents "factual information that he . . . was denied restoration rights because of the employment of another person." *See* 5 C.F.R. §§ 353.304 and 302.501 (2006).

As noted above, I found that the appellant alleged facts constituting a nonfrivolous allegation regarding each of the jurisdictional elements; therefore, he has established Board jurisdiction under Part 353. IAF1, Tab 17. *See Welby*, 101 M.S.P.R. 17, ¶ 15 (nonfrivolous allegations entitle the appellant to a merits hearing); *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1016-21 (Fed. Cir. 2002) (the Board's jurisdiction over a restoration appeal is established by nonfrivolous allegations).

However, for the reasons discussed below, I find that the agency did not deny his restoration rights because of the employment of another person.

The agency did not violate the appellant's restoration rights because of the employment of another person.

Because the appellant's full recovery from his compensable injury took longer than one year from the date his eligibility for compensation began, and he applied for reappointment within 30 days of the cessation of compensation, the appellant was entitled to agency-wide priority consideration for restoration to the position he left or an equivalent one. 5 C.F.R.

§ 353.301(b). When an appellant alleges that he was denied restoration rights, it is part of the agency's burden to submit evidence regarding available positions, and any restrictive qualification requirements, in order to show that it made all reasonable efforts to place the employee in his former position or an equivalent one. *See Pugh v. U.S. Postal Service*, 81 M.S.P.R. 313, ¶ 12 (1999) (citing *Tisdale v. Department of the Treasury*, 44 M.S.P.R. 390, 395 (1990) and *Metsopulos v. U.S. Postal Service*, 33 M.S.P.R. 536, 539 (1987)).

As an initial matter, I find that the PTF position to which the appellant was restored is not the same or equivalent to his former full-time position. The incumbent of a PTF position is guaranteed only part-time hours, and does not enjoy a set work schedule, holiday pay, or like status to a full-time regular position. *See Smith v. U.S. Postal Service*, 81 M.S.P.R. 92, ¶ 6 (1999) (an equivalent position for purposes of Part 353 is one of like seniority, status, and pay). However, contrary to the appellant's contention, he did not have an absolute right to be placed in his former position or an equivalent one. *See DeBlock*, 107 M.S.P.R. 90, ¶ 9 ("it appears that the appellant believes that he is entitled to a job, while the agency's obligation is only to give him priority consideration"); *Gallo v. United States*, 529 F.3d 1334, 1349-1350 (Fed. Cir. 2008) (unlike an employee who recovers within one year, an employee who recovers after more than one year is not entitled to full restoration, but is only guaranteed priority consideration in reemployment);

Kachanis v. Department of the Treasury, 212 F.3d 1289, 1295 (Fed. Cir. 2000) (the Court noted "the absence in § 8151(b)(2) of any details on the extent to which agencies are required to grant priority under that section, or on how agencies are to afford such priority," and concluded that the statute grants "the Office of Personnel Management and the agencies discretion in such matters").

Under the framework set forth by OPM, in order to appeal a violation of § 8151(b)(2), an employee must present factual information that he was denied restoration because of the employment of another person. *See* 5 C.F.R. § 302.501 (an individual who is entitled to priority consideration under Part 302 may appeal a violation of his restoration rights to the Board by presenting factual information that he was denied restoration rights because of the employment of another person). For the reasons set forth below, I find that the evidence of record does not establish that the appellant was denied restoration rights because of the employment of another person.

The evidence indicates that, as a nationwide policy, the agency fills its full-time regular positions by converting existing senior PTF employees who are on the agency's rolls.[4] HCD2, Testimony of Lonsdale.

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[4] The rare exception to this policy is when the agency is seeking employees with specialized technical skills, such as building maintenance, and it has no qualified employees to hire from within. HCD2, Testimony of Lonsdale.

I find that the agency did not hire any persons for positions in the local commuting area equivalent to the appellant's former position, because the overwhelming testimonies and evidence of record showed that the agency did not hire external candidates for full-time regular clerk positions during the relevant time period. The evidence showed the agency conducted the following hiring in the local commuting area. On March 17, 2007, the agency filled two residual[5] full-time Mail Processing Clerk positions at the Grand Forks, North Dakota Post Office. HCD, Testimonies of Wanda Cleveland, David Jones, and Kathy Flaa. Those two positions were filled through the conversion of two persons who were already employed by the agency as PTF clerks, Devon Larson and Teresa Martin, at the Grand Forks Post Office. *Id.* The agency also hired three new employees as PTF Mail Processing Clerks at the Fargo Post Office during the time period May 25, 2005, to March 31, 2007. HCD, Testimony of Flaa. Finally, the agency reassigned three existing employees into full-time Central Forwarding System (CFS) Clerk positions in Fargo between September 3, 2005, and February 18, 2006, as a result of Rehabilitation Modified Job Assignments provided to injured existing employees through the agency's Injury Compensation Office and OWCP. *Id.* The agency showed, by preponderant

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[5] Residual positions are those positions which were posted for bid, but were not filled during the bidding process. HCD1, Testimony of David Jones.

evidence, that it did not hire anyone into full-time regular craft positions who were not already employed by the agency.

Therefore, the evidence is insufficient to establish that the agency denied the appellant's restoration rights to a full-time regular position because of the employment of another person. *See Pugh*, 81 M.S.P.R. 313, ¶ 13 (the agency did not deny the appellant's restoration rights because of the employment of another person in the local commuting area because, although the agency filled custodian positions in the local commuting area, it did so by reassigning employees who were already on the agency's rolls) (citing *Raicovich v. U.S. Postal Service*, 675 F.2d 417, 418, 424 (D.C. Cir. 1982) (suggesting that an agency violates an employee's restoration rights only when it fills vacancies with "new employees" or "other applicants with no prior USPS association")); *White v. U.S. Postal Service*, 16 M.S.P.R. 492, 494 n.* (1983), *aff'd*, 758 F.2d 663 (Fed. Cir. 1984) (Table); *cf.* 5 C.F.R. § 330.205(c)(2)(i) (allowing an agency to fill a competitive service vacancy with a current, qualified employee of the agency through reassignment despite the presence of a qualified individual on the agency's reemployment priority list). Accordingly, I find that the agency did not hire any person over whom the appellant should have been accorded priority during the relevant period in the local commuting area.

I further find that the appellant was not entitled to agency-wide priority consideration, because he voluntarily accepted the agency's offer of a position in

Grand Forks. The agency went further than entering the appellant on its reemployment list went [sic] it formally offered the appellant the 11 positions it had open and available at that time. The agency's December 11, 2006 written offer did not state that the appellant's failure to accept one of the positions would result in the loss of his restoration rights for future vacant positions, and he acknowledged that no one told him he was required to accept any of them to retain his restoration rights. HCD2, Testimony of Juels. There is simply no evidence that the agency affirmatively misled the appellant or provided him with erroneous information. Therefore, I find that the appellant's acceptance of a PTF position in Grand Forks, which was not the same or equivalent to his former position, defeats his argument that his placement in that position violated his restoration rights. I further find that following the appellant's acceptance of the offer of a PTF position, the agency was not required to continue searching for other vacant positions for the appellant in the local commuting area or agencywide.[6]

Inasmuch as the appellant claims his restoration was improper under 5 C.F.R. § 353.107, I find the agency properly credited the time the appellant was receiving compensation from OWCP in calculating his

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[6] Lonsdale testified that had the appellant not accepted a position, she likely would have continued to search for equivalent positions for the appellant in widening concentric circles around Fargo. HCD2, Testimony of Lonsdale.

rights and benefits that are based on length of service. *See Gallo*, 529 F.3d at 1349-50. Specifically, upon the appellant's reemployment, the agency credited the time he was on OWCP compensation for purposes of determining his grade, PS level, years of service, and leave rate accrual; credited his prior sick leave balance of 477 hours; and waived his probationary period. IAF1, Tab 13, Subtab 4d; HCD1, Testimonies of Jones, Flaa, and Shari Reed; HCD2, Testimony of Juels.

The appellant maintains that the agency should have assigned him his original seniority date rather than the date he was reemployed on March 31, 2007. However, Article 37.2.D.5 of the collective bargaining agreement (CBA) between the agency and the American Postal Workers Union (APWU) provides that an employee who is reemployed after disability separation will receive seniority credit as if employment had not been interrupted only if the employee is reemployed in the same facility and craft from which the employee was originally separated. IAF1, Tab 13, Subtab 4d, p. 3; Subtab 4vv, p. 8; HCD1, Testimony of Jones. Because there were no vacant funded positions in Fargo, and the appellant voluntarily accepted a position at a different installation in Grand Forks, the appellant's seniority could not include the period while he was receiving OWCP benefits. Therefore, I find the agency properly assigned him a new period of seniority effective March 31, 2007, based on the applicable provision of the CBA. *See generally, Heidel v. U.S. Postal Service*, 69 M.S.P.R. 511, 519-20 (1996).

Based on the totality of the evidence, I find that the agency proved, by a preponderance of the evidence, that it did not deny the appellant's restoration rights as an employee who fully recovered after one year.

DECISION

The agency did not deny the appellant's restoration rights as an employee who fully recovered after one year. The appellant's request for restoration pursuant to 5 C.F.R. § 353.301(b) and 353.304(b) is DENIED.

FOR THE BOARD: /s/ Laura Albornoz
Laura M. Albornoz
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on ***November 3, 2008***, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a

petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the

date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's *Rules of Practice*, and Forms *5*, *6*, and *11*.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

[Certificate Of Service Omitted In Printing]

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

GERALD E. JUELS,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
SF-0353-08-0093-I-1

DATE: May 23, 2008

Gerald E. Juels, Grand Forks, North Dakota, pro se.

Marcella T. Clark, Esquire, Denver, Colorado, for the agency.

BEFORE
Kelly M. Humphrey
Administrative Judge

INITIAL DECISION

INTRODUCTION

On October 11, 2007, the appellant, a part-time flexible (PTF) Mail Processing Clerk, Grand Forks, North Dakota, filed a timely[1] appeal alleging the

[1] The Board's regulations provide that an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b). An

(Continued on following page)

agency violated his restoration rights as both a partially recovered and a fully recovered employee. Initial Appeal File (IAF), Tab 1. On November 13, 2007, the two claims alleged by the appellant were separated and docketed as two appeals.[2] IAF, Tab 4. The sole issue for adjudication in this appeal is the appellant's claim that the agency acted arbitrarily and capriciously in denying his request for restoration as a partially recovered employee. The Board has jurisdiction over the appeal pursuant to 5 C.F.R. § 353.304(c). *See Hardy v. U.S. Postal Service,* 104 M.S.P.R. 387, ¶ 16 (2007), *aff'd* 250 F. App'x 332 (Fed. Cir. 2007). A Board hearing in the appeal was held on April 17, 2008, in Seattle, Washington.

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agency must notify a partially recovered employee to whom the agency has denied restoration of his potential right to appeal the denial to the Board, regardless of whether the employee has put the agency on notice that he considers the denial arbitrary and capricious. *Cranston v. U.S. Postal Service,* 106 M.S.P.R. 290, 296 n.2 (2007). An appellant who was not provided a required notice of appeal rights is not required to show that he exercised due diligence in attempting to discover his appeal rights; the question is whether he was diligent in filing an appeal after he learned he could do so. *Id.* at p. 298. I find that the appellant's delay in filing should be waived for good cause shown, as he has shown, by preponderant evidence, that he filed his Board appeal within 30 days of learning of his appeal rights on September 11, 2007. IAF, Tab 2, Subtab 4d, pp. 6-7, 9.

[2] The appellant's other appeal concerns his claim that the agency improperly restored him, as a fully recovered employee pursuant to 5 C.F.R. § 353.301(b), to a position which was not equivalent to his former position. That appeal has been docketed as DE-0353-08-0023-I-1 and is pending a hearing before Administrative Judge Laura Albornoz.

For the following reasons, I find the agency did not violate the appellant's restoration rights as a partially recovered employee, and his request for restoration is DENIED.

ANALYSIS AND FINDINGS

Background

The following facts are undisputed unless otherwise noted. The appellant, who is 57 years old, was employed by the agency starting on January 28, 1974, as a PTF Distribution Clerk in Des Moines, Iowa. Effective September 5, 1975, he resigned from the U.S. Postal Service. IAF, Tab 2, Subtab 4uu, pp. 7-9. Effective May 18, 1976, the appellant was reinstated with the agency as a Distribution Clerk in Lubbock, Texas, and later was reassigned to a part-time letter carrier position effective November 20, 1976. IAF, Tab 2, Subtab 4uu, pp. 4-6. Effective September 10, 1977, the appellant transferred to Provo, Utah, as a Distribution Clerk. On August 11, 1979, he transferred to the Fargo, North Dakota Post Office as a Distribution Clerk. IAF, Tab 2, Subtab 4uu, pp. 1-3.

On October 9, 1981, while working at the Fargo Post Office, the appellant sustained a work-related injury to his back. At the time he sustained the injury, he stopped working and sought medical treatment. His injury was accepted by the Department of Labor, Office of Workers Compensation Programs (OWCP), for lumbar strain and psychogenic pain conditions. OWCP provided compensation benefits to the

appellant from November 24, 1981, through July 1, 1989. IAF, Tab 2, Subtab 4rr, pp. 3-19.

On September 27, 1983, the agency issued a notice of removal to the appellant, which he received on October 6, 1983, indicating he would be separated "for disability." The notice stated that he had been absent without pay because of illness since November 24, 1981. The agency removed the appellant effective February 24, 1984. IAF, Tab 2, Subtab 4tt.

OWCP scheduled the appellant for a second opinion medical examination with Dr. Wayne Tobin on June 1, 1989. When the appellant failed to appear for the medical examination, OWCP suspended his benefits for non-cooperation, effective July 7, 1989. The appellant did not appeal OWCP's decision. IAF, Tab 2, Subtab 4nn, p. 1.

More than 20 years after his removal, in May 2005, the appellant visited the agency's Seattle District Personnel Services Office and spoke with Shirley Bautista, Human Resources (HR) Specialist. The appellant asked Bautista about reemployment, explaining that he had previously been employed by the agency. She provided him with a reinstatement application. Hearing Compact Disc (HCD), Testimony of Bautista. On May 23, 2005, the appellant submitted his completed application for employment in Seattle. IAF, Tab 2, Subtab 4qq.

On May 31, 2005, Bautista submitted a request for the appellant's official personnel folder (OPF) to the National Personnel Records Center in St. Louis,

Missouri, where it had been archived. On June 29, 2005, Bautista interviewed the appellant for a position in Seattle. During the interview, the appellant indicated he was entitled to restoration to duty as a result of an on-the-job injury in 1981. IAF, Tab 2, Subtab 4oo. However, he did not indicate whether or to what extent he had recovered from his injury. HCD, Testimony of Bautista.

Susan Fletcher, HR Specialist, met with the appellant in June 2005 regarding his request for restoration. The appellant provided Fletcher with the Code of Federal Regulation provisions regarding restoration following a compensable injury. HCD, Testimony of Fletcher. She assured the appellant that she would try to find out what his rights were, and subsequently she sought guidance from the agency's Western Area Office and Injury Compensation Office, which advised her to seek more information from the appellant. HCD, Testimony of Fletcher. Jan Lonsdale, Manager of Injury Compensation for the agency's Western Area, testified that in 2005, a Seattle HR Specialist contacted her regarding the appellant's situation. Lonsdale, after consulting with the agency's legal counsel, advised the Seattle personnel office to seek more information to determine the appellant's restoration rights. Lonsdale testified that the agency had only minimal information at that time that the appellant was claiming to be an injured former employee, without confirmation from OWCP concerning the extent of his recovery, if any. HCD, Testimony of Lonsdale.

When the agency did not receive the appellant's OPF from the archives, it submitted a second request on July 5, 2005. IAF, Tab 2, Subtab 4pp. Also on July 5, 2005, the appellant requested that OWCP provide him with a copy of his OWCP file. Because his file had been placed in the archives', OWCP was unable to provide a copy to him until January 26, 2006. IAF, Tab 2, Subtab 4nn, p. 1. The agency no longer had his injury compensation file because it had been destroyed pursuant to its seven-year retention policy. HCD, Testimony of Lonsdale.

On December 7, 2005, Evelyn Gordon, Manager of Personnel Services for the Seattle District, sent a letter to the appellant acknowledging his interview as a result of his reinstatement request. In the letter, Ms. Gordon stated in part:

> [Y]ou indicated that you were entitled to restoration to duty as a result of an on the job injury with the U.S. Postal Service in 1981. Under what provisions of 5 CFR-6, 353.302[3] do you qualify for restoration. Please provide the documentation in writing

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[3] The agency acknowledged that its cite to § 353.302 was an error, and that it had intended to cite to the section immediately preceding that section, 5 C.F.R. § 353.301. HCD, Testimony of Lonsdale. I note that the appellant had Part C of the Code of Federal Regulations governing restoration rights following a compensable injury, which he had taken with him to meetings with agency officials, and given the context of his discussions with the agency about restoration, he knew or should have known that the agency's citation was an error.

> to this office to substantiate your right to restoration.

IAF, Tab 2, Subtab 4oo. Gordon testified that there was no deadline for the appellant to respond to her letter. HCD, Testimony of Gordon.

On January 27, 2006, the appellant sent a letter to OWCP indicating he wished to be scheduled for a medical examination. IAF, Tab 2, Subtab 4nn. He also met with an OWCP Claims Examiner on February 13, 2006, who told him that he would not be referred for a second opinion medical examination right away because of other referrals ahead of his, but that he would be scheduled in about six weeks. *Id.* Because the last medical report on file was dated May 9, 1983, OWCP requested updated medical records and information about the appellant's work activities after 1983. *Id.*, p. 2. Thereafter, OWCP restored the appellant's benefits effective January 27, 2006, the date he had indicated his willingness to undergo a medical examination. IAF, Tab 2, Subtab 4x, p. 1; and Subtab 4rr, p. 2.

On June 2, 2006, the appellant underwent a second opinion medical examination directed by OWCP. In medical reports dated June 2, 2006, the physicians who examined the appellant opined that he no longer had a medical condition or disability as a result of his 1981 work-related injury. Accordingly, OWCP issued a notice proposing that his medical benefits and compensation for wage loss be terminated. IAF, Tab 2, Subtab 4mm. On August 11, 2006,

OWCP notified the appellant that his claim for medical and wage loss benefits was terminated effective August 11, 2006, because the medical evidence showed he no longer had any residuals or disability due to his work injury. IAF, Tab 2, Subtab 4ll. OWCP notified him that employees who recover after one year are entitled to priority consideration provided they apply for reemployment within 30 days after compensation ends. *Id.* Therefore, on August 11, 2006, the appellant was fully recovered from his compensable injury.

On September 8, 2006, the appellant submitted a request for reinstatement to the Seattle District personnel office, along with OWCP's letter terminating his benefits. IAF, Tab 2, Subtab 4ii. On September 12, 2006, Kathleen Grosso, Seattle District Manager of Human Resources, sent the appellant a letter advising him to contact HR Specialist Jay Bonner to begin the pre-employment process. IAF, Tab 2, Subtab 4hh. On October 6, 2006, the appellant sent a letter to Katherine Nash, the Seattle Postmaster, informing her that he was a former Postal worker attempting to return to duty after a compensable injury. Nash forwarded his letter to Grosso. IAF, Tab 2, Subtabs 4ff and 4cc.

On October 6, 2006, the appellant met with Gordon regarding his prospective reemployment, and he agreed to take Test 473 (a Postal examination all new employees must pass) on October 11, 2006. IAF, Tab 2, Subtab 4ee. Gordon testified that she believed that the appellant's restoration rights applied only in

the Dakotas District, his former local commuting area, and that if he wanted a position in Seattle, he would be required to meet all requirements of reinstated employees, such as the 473 examination. HCD, Testimony of Gordon. Gordon testified that she considered the appellant's situation as a reinstatement to the Seattle District rather than a restoration. *Id.*

On October 30, 2006, the appellant sent a letter to Gregory Johnson, Postmaster of the Fargo Post Office, informing him that he was attempting to return to duty after a compensable injury. He stated that the injury occurred at the Fargo Post Office on October 9, 1981, and that he had been separated for disability on February 24, 1984. The appellant stated in his letter that the Fargo Post Office "has been and remains [his] first choice for restoration with the U.S. Postal Service" and requested to be notified of any openings for Distribution Clerk positions. IAF, Tab 2, Subtab 4dd.

The appellant sent a second letter to Nash on November 2, 2006, stating that he preferred to be reinstated to the Fargo Post Office, but he would accept Seattle or another location, if necessary. IAF, Tab 2, Subtab 4bb. Nash responded on November 7, 2006, and forwarded a copy of his letter to Grosso. IAF, Tab 2, Subtab 4y. Grosso consulted with the agency's Injury Compensation department, who informed her that the appellant's restoration rights were in North Dakota. HCD, Testimony of Grosso. On November 3, 2006, Grosso sent a letter to the appellant informing him that his request for restoration

would be forwarded to the Dakotas District for action because that was his former commuting area. IAF, Tab 2, Subtab 4aa.

On November 7, 2006, the appellant wrote to Grosso, complaining that he had made Seattle his home and he did not think it was reasonable for the agency to expect him to move to another location. IAF, Tab 2, Subtab 4x. He stated that since OWCP declared him fully recovered, he was seeking restoration as a fully recovered employee and for the agency to restore him in Seattle, his current place of residence. *Id.*

The appellant's November 7, 2006 letter was forwarded to Lonsdale. On November 20 and 30, 2006, Lonsdale informed the appellant that she was investigating his concerns and would respond to his letter. IAF, Tab 2, Subtabs 4u and 4v. Lonsdale explained in her letters to the appellant that obtaining all of the required information was a challenge because of "the unique circumstance of [his] separation from the Postal Service more than 20 years ago and lack of any communication until last year." *Id.* She notified him that the agency was looking for an appropriate placement for him as a fully recovered employee pursuant to 5 C.F.R. § 353.301(b).

On December 6, 2006, Lonsdale sent the appellant a letter explaining that when the appellant first contacted the Seattle district in 2005, they were unable to determine what his restoration rights were because: (1) he had no current status with OWCP

because his benefits had been suspended for non-cooperation; (2) he provided no medical documentation; and (3) he did not respond to the agency's December 7, 2005 letter asking for more information regarding under what provisions he was requesting restoration. IAF, Tab 2, Subtab 4t. Therefore, the agency treated his restoration request as a reinstatement request. Lonsdale further explained that OWCP ended his compensation on August 11, 2006, and therefore his rights as a fully recovered employee began on that date. She stated that the agency would search for work agency-wide, starting with his former commuting area of Fargo, until an appropriate position was found. *Id.*

On December 11, 2006, Lonsdale sent a letter to the appellant identifying several vacancies for PTF positions throughout the Dakotas District. The agency stated that its offer of those positions was open until December 22, 2006, and that if he accepted one of the positions the agency would complete the hiring process and provide a start date. IAF, Tab 2, Subtab 4r. On December 22, 2006, the appellant accepted a PTF Mail Processing Clerk position in Grand Forks, North Dakota. IAF, Tab 2, Subtab 4q. On March 20, 2007, the appellant was notified that he had would be [sic] reinstated as a PTF Mail Processing Clerk, PS-5, at the Grand Forks Post Office effective March 31, 2007. IAF, Tab 2, Subtabs 4n, 4m, and 4l. This timely appeal followed.

After concluding that the appellant made non-frivolous allegations sufficient to establish Board

jurisdiction, I convened a hearing in the appeal on April 17, 2008, in Seattle, Washington.

Burdens of Proof and Jurisdiction.

The Board's jurisdiction is limited to those matters over which it has been granted jurisdiction by law, rule or regulation. 5 U.S.C. § 7701(a); 5 C.F.R. § 1201.3; *see also Garcia v. Department of Homeland Security,* 437 F.3d 1322, 1327 (Fed. Cir. 2006) (en banc). The appellant has the burden of proving, by a preponderance of the evidence, that the Board has jurisdiction over his appeal. 5 C.F.R. § 1201.56(a)(2)(i). A preponderance of the evidence is that amount of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.56(c)(2).

The Board may exercise jurisdiction over a Postal Service employee's claim that the agency violated his restoration rights as a fully or partially recovered employee under 5 C.F.R. Part 353, Subpart C, regardless of whether he is a preference eligible or supervisory or managerial employee. *See* 5 C.F.R. §§ 353.102-103; *Chen v. U.S. Postal Service,* 97 M.S.P.R. 527, 532, ¶ 12 (2004); *Allen v. U.S. Postal Service*, 73 M.S.P.R. 73, 76 (1997). To establish Board jurisdiction over a restoration claim as a partially recovered employee, the appellant must allege facts that would show, if proven, that: (1) he was absent from his position due to a compensable injury; (2) he recovered sufficiently

to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of him; (3) the agency denied his request for restoration; and (4) the denial was "arbitrary and *capricious.*" *See Chen,* 97 M.S.P.R. 527, ¶ 13; *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1018-20 (Fed. Cir. 2002); *Morman v. Department of Defense,* 84 M.S.P.R. 96 (1999).

As noted above, I found that the appellant alleged facts constituting a nonfrivolous allegation regarding each of these elements; therefore, he has established Board jurisdiction under Part 353. *See Hardy,* 104 M.S.P.R. 387, ¶ 17; *Welby v. Department of Agriculture,* 101 M.S.P.R. 17, ¶ 15 (2006) (nonfrivolous allegations entitle the appellant to a merits hearing); *Walley,* 279 F.3d at 1019 (the Board's jurisdiction over a restoration appeal is established by nonfrivolous allegations). For the reasons discussed below, however, I find that the appellant has failed to prove, by preponderant evidence, that the agency acted to deny his request for restoration as a partially recovered employee in an arbitrary and capricious manner.

The agency did not violate the appellant's restoration rights.

When an employee partially recovers from a compensable injury and is able to return to limited duty, agencies must make every effort to restore the

individual in the local commuting area. 5 C.F.R. § 353.301(d). "Partially recovered" means an injured employee who:

> though not ready to resume the full range of his or her regular duties, has recovered sufficiently to return to part time or light duty or to another position with less demanding physical requirements. Ordinarily, it is expected that a partially recovered employee will fully recover eventually.

5 C.F.R. § 353.102; *Smith v. U.S. Postal Service,* 81 M.S.P.R. 92, 96 (1999).

The restoration rights of an individual who partially recovers from a compensable injury are set forth at 5 C.F.R. § 353.301(d):

> Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended. (See 29 U.S.C. 791(b) and 794.) If the individual fully recovers, he or she is entitled to be considered for the position held at the time of injury, or an equivalent one. A partially recovered employee is expected to seek reemployment as soon as he or she is able.

Finally, the appeal rights of an employee claiming a violation of his restoration rights as a partially recovered individual are defined by 5 C.F.R. § 353.304(c):

> An individual who is partially recovered from a compensable injury may appeal to MSPB for a determination of whether, the agency is acting arbitrarily and capriciously in denying restoration. Upon reemployment, a partially recovered employee may also appeal the agency's failure to credit time spent on compensation for purposes of rights and benefits based upon length of service.

Thus, a "partially recovered" employee may appeal to the Board only for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration. 5 C.F.R. 353.304(c); *Smith,* 81 M.S.P.R. at 96. The appellant has the burden of proving, by preponderant evidence, that the agency's denial of his request for restoration was arbitrary and capricious. *Chen*, 97 M.S.P.R. 527, ¶ 18.

First, I find the appellant was absent from work due to a compensable injury. A "compensable injury" is a medical condition accepted by OWCP to be job-related and for which medical or monetary benefits are payable from the Employees' Compensation Fund. *Mobley v. U.S. Postal Service,* 86 M.S.P.R. 161, ¶ 16 (2000); *Steinmetz v. U.S. Postal Service*, 106 M.S.P.R. 277, ¶ 8 (2007). Here, the appellant was removed from the agency effective February 24, 1984, based on disability after his injuries were accepted by OWCP.

IAF, Tab 2, Subtab 4tt. *See McCloud v. U.S. Postal Service*, 71 M.S.P.R. 508, 511-12 (1996). The appellant therefore established that his absence from his position following his back injury was due to the compensable injuries for which he ultimately received compensation from OWCP.

Second, I find that the appellant has shown he was at least partially recovered when he made his request for restoration in May 2005. Dr. Benjamin Dy and Dr. Kenneth Reger examined the appellant and prepared medical reports on May 27, 2005.[4] The reports noted the appellant's clinical history as chronic back pain. They opined that he had minimal spondylolthesis and mild degenerative changes at two facet joints. IAF, Tab 2, Subtab 4j, p. 2. Dr. Dy diagnosed the appellant with chronic lumbo-sacral strain of moderate severity, and described his restrictions as no lifting over 30 to 40 pounds on a constant basis. Dr. Dy stated the appellant could perform light work. *Id.*, pp. 4-5. This medical evidence shows that he had "recovered sufficiently to return to part time or light duty or to another position with less demanding physical requirements." 5 C.F.R. § 353.102. Therefore, I find the appellant established that he was at least partially recovered at the time he requested to be reemployed by the agency in May 2005.

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[4] The appellant did not provide these medical reports to the agency until April 12, 2007. IAF, Tab 2, Subtab 4j.

The appellant argues that the agency's delay from May 2005 to March 2007, the date of his full restoration, was so unreasonable as to constitute a denial of his request for partial restoration. I find that an agency's delay in restoring a partially recovered employee may constitute a denial of restoration under certain circumstances. *Hardy,* 104 M.S.P.R. 387, ¶ 20 (citing *Chism v. U.S. Postal Service*, 85 M.S.P.R. 436, ¶ 10 (2000), *overruled on other grounds by Chen*, 97 M.S.P.R. 527, ¶ 18); *Taylor v. U.S. Postal Service,* 69 M.S.P.R. 479, 483 (1996) (where the agency's medical unit failed to timely approve the appellant's physician's clearance to return to work and the agency placed appellant her [sic] in a light-duty position for one and one-half hours and then delayed for three weeks in returning her to this position).

However, I find that the agency did not act arbitrarily or capriciously in denying the appellant's restoration request. It is undisputed that the agency did not ever expressly deny the appellant's May 2005 request for restoration. And, I find that the agency did not act or fail to act so as to deem his request denied. Indeed, the agency restored the appellant as a fully recovered employee pursuant to 5 C.F.R. § 353.301(b) effective March 31, 2007.[5]

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[5] As noted above, the appellant's appeal regarding whether the agency met its obligation under 5 C.F.R. § 353.301(b) to restore him to a position equivalent to the one he left, is pending a Board hearing.

Bautista testified that while she was involved in the appellant's request for reemployment, she treated the appellant's request the same as she did any other request, by giving him a reinstatement package, interviewing him, and requesting his OPF from the National Records Center, where it had been archived. HCD, Testimony of Bautista. Fletcher testified that she also took steps to reemploy the appellant by re-requesting his OPF from the archives, and seeking guidance to discover the appellant's rights. HCD, Testimony of Fletcher. Lonsdale testified that she instructed the Seattle District personnel to request additional information from the appellant, since the agency did not have sufficient information to act further on his apparent restoration request. Both Fletcher and Lonsdale testified that a delay of five or six months was not an unusually long period of time to obtain information and find a position for an employee. HCD, Testimonies of Fletcher and Lonsdale.

Lonsdale explained that because OWCP was not involved in the appellant's request to be restored, as usually is the case, the agency was uncertain regarding the appellant's status.[6] HCD, Testimony of Lonsdale. Lonsdale testified that the agency had no medical or other information from any source regarding whether the appellant was physically disqualified, partially recovered, or fully recovered, or of his

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[6] In fact, OWCP had suspended the appellant's compensation benefits in 1989 for non-cooperation with a medical examination, not based on any recovery by the appellant.

OWCP status. Further, she testified that the agency did not have information regarding whether the appellant had specific medical restrictions. Lonsdale testified that requests for restoration usually are initiated by OWCP, which informs the agency that an employee has partially recovered, advises the agency regarding restrictions, instructs the agency to search for positions for the employee, and later approves the position if its meets the employee's restrictions. Lonsdale testified that since the appellant initiated his own restoration request, a significant period of time had passed, and the agency had no medical documentation, the agency had no information upon which to base a search for positions within the appellant's medical restrictions. *Id.*

Although on April 12, 2007, the appellant provided the agency with some medical records dated May 2005 (IAF, Tab 2, Subtab 4j), the agency had no medical documentation at the time he made the restoration request that he had partially recovered or was in receipt of partial compensation from OWCP. *See Gilbert v. Department of Justice,* 100 M.S.P.R. 375, ¶ 17 (2005) (current receipt of partial compensation from OWCP generally suffices to establish that the appellant was partially recovered). Further, due to the passage of over 20 years since the appellant's removal, the agency had destroyed his injury compensation file, and it had archived his OPF. Likewise, OWCP did not have the appellant's case file until January 2006. Lonsdale and Gordon testified that, due to the lack of documentation, the agency

concluded that it needed more information regarding under what provisions the appellant believed he was entitled to be restored. HCD, Testimonies of Lonsdale and Gordon. Although the agency cannot impose on an employee any additional requirements to place the agency on notice he is seeking restoration (*see Gerdes v. Department of the Treasury*, 89 M.S.P.R. 500, ¶ 13 (2001)), here the agency's written request for additional information was reasonable under the circumstances. I find that the appellant's decision not to respond to Gordon's December 7, 2005 letter, but instead to wait for his OWCP file, contributed to the agency's delay in restoration. *See Hardy,* 104 M.S.P.R. 387, ¶ 25 (the agency did not act arbitrarily or capriciously where the appellant did not follow the agency's directions to coordinate with personnel and injury compensation departments, and the agency did not understand that he was requesting restoration under 5 C.F.R. § 353.301(d)).

The appellant explained that he did not provide additional information as requested because he was waiting for OWCP to return his OWCP records from the archives "so [he] could decipher and respond to Ms. Gordon's letter." IAF, Tab 2, Subtab 4x, p. 1. After the appellant contacted OWCP indicating he wished to undergo a medical examination, it restored his benefits effective January 27, 2006, and scheduled him for a medical examination, which he underwent on June 2, 2006. *Id.*; IAF, Tab 2, Subtab 4rr, p. 2. OWCP explained to the appellant that there would be a delay in scheduling his examination. In June 2006,

the medical information indicated that the appellant had fully recovered from his work-related injury and OWCP took steps to terminate the appellant's compensation benefits. Thus, the agency was not arbitrarily refusing to restore the appellant in the face of information showing he could return to work with certain restrictions. *Cf. Chism*, 85 M.S.P.R. 436, ¶ 2 (where the appellant's physicians furnished OWCP with letters indicating that the appellant could return to work full-time with certain restrictions, and on multiple occasions between 1991 and 1998, the appellant and an OWCP claims examiner requested that the agency restore the appellant to a position within his restrictions but the agency failed to do so).

Under the unique circumstances presented here, I find that the agency's actions were not arbitrary or capricious when it delayed restoring the appellant. I find that the agency's delay was due, in part, to the passage of over 20 years since the appellant's removal, and the resulting unavailability of the appellant's employment, medical, and OWCP records. Further complicating matters was the appellant's various simultaneous communications about reemployment with Seattle and Fargo, and his failure to respond to the agency's December 7, 2005 letter seeking more information about his request for restoration. Finally, the delay was also due to the OWCP administrative process after the appellant requested to be scheduled for a medical examination in January 2006, to when OWCP actually scheduled his examination in June 2006, and eventually terminated his

benefits on August 11, 2006. As noted, the appellant himself was waiting on OWCP in order to respond to Gordon's December 7, 2005 letter seeking information regarding his entitlement to restoration. Based on the preponderant evidence, I cannot conclude that the agency acted arbitrarily or capriciously under the circumstances. In fact, the agency eventually accomplished the appellant's restoration.

Based on the totality of the evidence in this case, I find that the appellant did not show, by a preponderance of the evidence, that the agency's actions were arbitrary or capricious. Therefore, I find the agency did not violate the appellant's restoration rights as a partially recovered employee in the Seattle District.

DECISION

The appellant's request for restoration pursuant to 5 C.F.R. § 353.301(d) and 353.304(c) is DENIED.

FOR THE BOARD: /s/ Kelly M. Humphrey
Kelly M. Humphrey
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on ***June 27, 2008***, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you

received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative

judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's *Rules of Practice*, and Forms *5*, *6*, and *11*.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

[Certificate Of Service Omitted In Printing]

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-3171

GERALD E. JUELS,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

Petition for review of the Merit Systems Protection Board in DE0353080023-1-2.

ORDER

(Filed Jan. 13, 2010)

A petition for rehearing en banc having been filed by the Petitioner, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate has already issued.

FOR THE COURT,

/s/ Jan Horbaly [LB]
Jan Horbaly
Clerk

Dated: 01/13/2010

cc: Gerald E. Juels
Amanda L. Tantum

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(MSPB – DE0353080023-I-2)